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COMMENTARIES ON STATUTE

AND

CONSTITUTIONAL LAW.

J. M. Buford.

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COMMENTARIES

ON

STATUTE

AND

CONSTITUTIONAL LAW

AND

STATUTORY AND CONSTITUTIONAL CONSTRUCTION,

CONTAINING

AN EXAMINATION OF ADJUDGED CASES ON CONSTITUTIONAL LAW UNDER THE CONSTITUTION OF THE UNITED STATES, AND THE CONSTITUTION OF THE RESPECTIVE STATES CONCERNING LEGISLATIVE POWER, AND ALSO THE CONSIDERATION OF THE RULES OF LAW IN THE CONSTRUCTION OF STATUTES AND CONSTITUTIONAL PROVISIONS.

BY E. FITCH SMITH,
COUNSELLOR AT LAW.

"Ex antecedentibus et consequentibus fit optima interpretatio."—2 INST. 317.
"Quoties in verbis nulla est ambiguitas ibi nulla expositio contra verba fienda est."
[WING'S MAXIMS, p. 24.
"Nova constitutio futuris formam imponere debet non præteritis."—2 INST. 292.

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PREFACE.

In presenting these Commentaries to the public, I have to admit, that owing to circumstances beyond my control, they are not as full, and complete as I could wished to have made them. Many branches of constitutional law within the appropriate range of my subject, remain untouched, and in many instances, those that have been treated of, necesarily have been but partially considered. It is to be regretted, that a subject of so much importance at the present time, had not received the consideration of an abler mind, or that what has been done by me, had not been executed in a better manner. I am conscious of defects in what I have done, but the defects that do exist in this work, so far as constitutional law is concerned, are supplied to a great extent, by the previous able, and distinguished Commentaries of the late Mr. Justice Story. With such a predecessor on any subject, and especially that of constitutional law, the mind naturally shrinks in distrust of its own powers, to travel even at a remote distance, along the path which has been illuminated and rendered brilliant by his refined and cultivated intellect. That distrust is heightened, when it is considered, he had great opportunities to acquire much learning on this subject; having for many years occupied a seat in the highest, and I hesitate not to say, the ablest judicial tribunal, which ever adorned the jurisprudence of any nation; that too, at a period when the constitutional law of a New World, was the theme of forensic discussion, and judicial determination, by a galaxy of forensic and judicial talent, unsurpassed in point of brilliancy,

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and deep legal acumen, in any era of the world's history. None of those advantages have been enjoyed by me; all that has been acquired on the subject of constitutional law, has been derived from other sources, in prosecuting the humbler walks of a private professional life.

The difficulty of grasping, and at the same time condensing this subject, presents to the mind, much intrinsic difficulty, well calculated to embarrass and perplex an author. The subject itself, is of such a nature, as not to be susceptible of illustration and exemplification, like many common law rules, by a few succinct, terse, elementary principles. Without exemplification, and illustration, the elementary principles of constitutional construction, can hardly be so stated as to be clearly understood, or rendered intelligible. Any work on constitutional law without this, would be a mere digest, and valuless to the profession, except as an index of cases. A conviction of this, has in many instances, induced me to insert at some length, the reasons upon which a particular construction has been founded. This has been done to an extent, which would be unwarranted in a commentary upon almost any other juridical subject. In this country, there has, for a long time, been evinced in our legislative bodies, a propensity to legislate, so much so, that even unconstitutional legislation, or at least, that of doubtful constitutionality, has been carried to an alarming extent. An excess of legislation, is one of the greatest evils which has engrafted itself upon our political institutions. It has indeed become as a mildew, and blighting curse upon the body politic, and the jurisprudence of the present age. A deep conviction of this fact, has induced me, in numerous instances, to interpose objections to particular acts of legislation, and to protest against their validity. I have endeavored to support such objections by such arguments and facts, as for the time being, lay within the range of my intellectual powers. Whenever this has been done, whatever views I may have expressed, as the convictions of my

own mind, I by no means expect such parts of these commentaries will be regarded as authoritative, nor do I expect, or claim for them, in this respect, any greater weight, or consideration, than such arguments, as have been adduced in their support, are justly entitled to, when considered by candid and unprejudiced minds. If my labor in this respect, shall in the least degree tend to stay the progress of the political pestilence of excessive and unconstitutional legislation, I shall ever regard it the best service I can render to my country. I am frank to admit, I am an advocate for a strict construction of the constitution, and opposed to any latitudinarian construction of such a solemn instrument. This opposition may sometimes have led me to advance sentiments, and adopt rules of construction, which by some minds, may be regarded as savouring too much of ultraism, or bordering upon impracticability. If so, my apology is;—infallability is not the boon of any man or body of men, it pertains not, either to the church or state, to man as man individually, or to men collectively. In short, to "err is human." If in the particulars above stated, I have erred, I think I may console myself with the reflection, that my errors, to say the least of them, are on the safe side, and until a change shall take place in the moral constitution of mankind, those errors will be less likely to be copied than they would have been, if the sentiments I have advanced and advocated, had been in more perfect unison with a construction, favorable to an aggression upon those private rights, around which, it was the design of the framers of our fundamental laws to throw the broad shield of the constitution. While on the one hand, I have designed that these commentaries should not be a mere compilation of constitutional law, nor a simple digest of cases, on the other, I do not claim for them, much originality. To be original upon such a subject, since the days of a Marshall, and his illustrious compeers, would at least be somewhat difficult for any mind, and would be a serious fault in a commentator. Neither an aspiration for fame as an au-

thor, nor an estimate of my own powers, has as yet induced a belief, that the attainment of such an end is possible for me in this department of juridical science. No attempt therefore, has been made at such an acquisition, neither do I possess the gift, even if I had the inclination. If, so far as annotation is concerned, the meed of accuracy shall be awarded to me, by my professional brethren, my highest aspirations as an author will be fully satisfied. If in this respect I have done any service to the legal profession, or to those clothed with the sacred trust of legislative, or judicial authority, I shall have attained the only reward I anticipated in the undertaking. I entered upon this work, with much distrust, and many misgivings, anticipating at the outset, much difficulty in condensation, to an extent, which would admit of confining myself to a single volume. In every step of my progress, I have found that difficulty increased, as every constitutional question opens to the mind so many, and such varied trains of thought, susceptible of so many different views, each tending to a different conclusion, each demanding a passing notice in the prosecution of the subject. In many instances, questions have arisen, which have elicited such and so great contrariety, as well as conflict in opinion, as that a review of such opinions has been deemed indispensable.

The first five chapters of this work, are confined to a succint review of the origin and history of legislation. In this part of my undertaking, I have been unable to take but a very limited view of a subject, which, in itself, affords an appropriate theme for many volumes. The sixth chapter contains nothing either original or expository. It has been inserted simply for the purpose of reference. In the perusal of this work, it may be entirely omitted, as it stands disconnected with the train of thought pursued either in the previous, or in the subsequent chapters. The seventh chapter is devoted to a consideration of the question, as to the extent of legislative authority, independent of any constitutional restriction upon legis-

lative power, or in other words, a discussion of the doctrine of the omnipotence of parliament, or of the legislature, when applied to our legislative bodies, under our written constitutions, and peculiar forms of government. I would here remark, since that chapter was put to press, I have been furnished with a manuscript copy of the opinion of Mr. Justice Barculo, in the case of *The People ex rel. Fountain et al.* v. *The Board of Supervisors of Westchester County*, which I understand, is to be published in the next volume of Barbour's Supreme Court Reports. The learned judge in that case, fully sustains, and forcibly illustrates the doctrine, that under our form of government, there are limits to legislative authority, irrespective of any constitutional restrictions upon legislative power. I would call the attention of the profession to that case, in connection with the subject considered in this seventh chapter. The two succeeding chapters, are devoted to the consideration of constitutional restrictions upon legislative power contained in the federal and state constitutions, and the construction which has been put upon such restrictive provisions. Those restrictions have been considered in three different aspects. 1st. Those contained in the federal constitution, and which are applicable to the government created by that instrument. 2d. Those contained in the same instrument which are applicable to the state legislatures. 3d. Those contained in the constitutions of the respective states, and which are applicable only to the legislature of the particular state, by whom the constitution was adopted. The third subdivision, so far as I am aware, has not as yet, been the distinct theme of any American commentator on constitutional law. I have therefore devoted more time to the consideration and discussion of that subject, than to any other branch of constitutional law. In surveying, as I have done for the first time, this new field as a commentator, I have taken greater liberty in presenting my own views, and in reviewing those of others, than I otherwise should have done. Some of the questions

which have been discussed and reviewed by me, have never as yet, been the subject of judicial determination, and therefore cannot be regarded as settled. Viewing them in that aspect, I have deemed it not inappropriate to present my views, to the end, if the same questions shall hereafter, come up for adjudication, they may be thrown into the scale in common with the opinions of others. Whether they will stand the test of the judicial crucible, I pretend not to affirm, nor can I, with any degree of certainty, predict. In the consideration of constitutional restrictions upon legislative power, under the federal constitution, I have discussed the questions arising under the following heads to wit: The constitutionality of laws impairing the obligation of contracts; *Expost facto laws;* laws which take private property for public use; laws regulating commerce; laws affecting the right of trial by jury; laws imposing taxes; statutes of limitations which bar actions upon past disseisins, and laws relating to imports and duties. The same general heads have also been considered, whenever they have arisen under any of the provisions contained in the respective state constitutions. I have also considered and discussed, the absolute, and qualified restrictions upon legislative power contained in instruments of the latter class, as well, those which relate to the mode of exercising legislative authority in given cases, as those of an absolute character, affecting the right to an exercise of legislative functions in given instances. Under this head will also be found a consideration of the constitutionality of laws, which are retrospective, having a retroactive effect, laws divesting antecedently vested rights, judicial acts of legislation, also remedial acts curing defects in antecedent transactions, or in conveyances defectively executed. The remaining chapters are devoted to the consideration of the rules for the construction of statutes. There is no American work on this subject. I have not, except in a few instances, and that for a short time only, had access to the English work of Mr. Dwarris, on the same subject. Hence I have been unable

to make that my text book, or to refer to it as often as I otherwise should have done. I have however, made frequent extracts from it, as I have from time to time, found them in other works, and in judicial decisions. I have to acknowledge my indebtedness to that learned author, for all the reader will find contained in my tenth chapter, on the subject of the boundaries of legislative and judicial construction. I have had to mark out, and pursue my own order of arrangement, and have endeavored to annotate and illustrate in most instances, American authorities, deeming them more advantageous to my readers, and as affording in themselves better and more satisfactory illustration of the statute law of the American states. The elementary rules of construction, are few and simple, yet notwithstanding they are so, the application of those rules to given cases, arising out of the complex provisions as well as variety of statutory enactments, is not without much intrinsic difficulty. I am aware, many minds regard the subject matter of this branch of my work, too trivial to demand consideration; too plain to need elucidation. Not unfrequently have I had the remark made to me, that this branch of my subject was unworthy a moment's consideration, as it was perfectly familiar to every tyro in the legal profession. Such remarks have fallen from those for whom I have great respect, and ought perhaps, to have deterred me from prosecuting my undertaking. I have however assumed, that it does not necessarily follow, because the elementary rules of any science, or of any body of laws are few, that they are not, notwithstanding, involved in much that is intricate, as well as difficult in their application. The common law affords a striking illustration of the truth of this remark, and so too do the laws pertaining to the natural sciences. The law of gravitation for instance, has but one single elementary rule, pervading the entire system of worlds, and extending through the whole range of matter, yet it would be a work of great intrinsic difficulty, to analyze and arrange, even that single rule, and apply it to every complex and variegated combi-

nation of material substances, so as, at once to discover the precise extent, or degree of its application, its consequences and effects in a given case. Still more difficult would it be, to combine in any one single proposition, or even in a class of general propositions, an accurate and complete definition and illustration of this rule; so plain, simple, and manifest, as that any mind of ordinary capacity, could at once, from such definition, grasp all that pertains to that intricate, complicated, wonderful law of the natural world. The same may be said of those rules, which pertain to all other departments of human science. If a single rule is involved in much which is intricate, certain it is, that a multiplicity of rules, pervading an entire system of laws, cannot, and ought not, to be regarded as undeserving of a critical and minute investigation and analysis. How far I have succeeded in analyzing and illustrating the subject I have treated of, it does not become me to judge. I am deeply sensible this work must stand or fall solely upon its own intrinsic merits. It has no preconceived public sentiment in its favor. It is unheralded by the public press, and is probably unexpected by the great mass of the legal profession and its author to a great extent unknown to them. It is submitted to the profession with much distrust as to its merits, and under a consciousness of its numerous defects.

E. Fitch Smith.

New York, Oct. 1, 1848.

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ERRATA.

In many instances the author has been prevented from revising the proof sheets; hence, owing to defects in manuscript, several important typographical errors, affecting in some cases, the grammatical sense, and in others, substituting erroneous words; have found their way into this work. The reader is respectfully requested to note them before the perusal. They will be found as follows, viz:

On page 38, in the 6th and 7th lines from the bottom of the page, for the Latin quotation from Cicero, read, "*Tum enim magistratum non gerebat is, qui ceperat si patres auctores non erant facti.*"

On page 258, for "*truths,*" read *truth;* for "*prevailing,*" read *pervading.*

On page 302, in the 6th line from the bottom of the page, for "*is,*" read *are.* In the same line, and 5th line from bottom, for "*in itself,*" read *per se.*

On page 306, in the 6th line of § 169, for "*prospective,*" read *retrospective;* and in the 5th line of § 170, for "*prospective,*" read *retrospective.*

On page 308, in the 3d line of § 172, for "*prospective,*" read *retrospective.*

On page 446, in the 14th line from the bottom of the page, for "*influences,*" read *influence.*

On page 523, in the 8th line of § 362, after the word "*legislature,*" insert the word *on.*

On page 577, in the 9th line of § 404, for "*constitutes,*" read *constitute.*

" 581, in the 5th line of § 412, for "*défenda,*" read *défend.* In the 7th line of the same section, for "*que' il,*" read *qu' il.*

On page 588, in § 419, for "(*a*)," read (*c.*)

" 634, in the last line of § 490, for "*materii,*" read *materia.*

" 651, in the 14th line of § 505, for "*extum,*" read *textum.* In the 1st line of § 506, for "*demonstration on,*" read *demonstratio non.*

On page 666, in the 1st line of § 523, after the word "*construed,*" strike out the word "*so.*"

On page 742, in the 3d line from the bottom of § 624, for "*are themselves,*" read *is an;* and in the same line, for "*interpretations,*" read *interpretation.* In the 2d line from the bottom of the same section, for the word "*might,*" read *may.*

On page 809, in 6th line from the top, for "*trustee,*" read *trustees.*

" 813, in 3d " " for "*inapplible,*" read *inapplicable.*

" 821, in 7th " " for "*contract,*" read *context.*

" 821, in 6th line of § 703, for "*interest,*" read *intent.*

" 864, in 12th line from bottom, for "*could court not,*" read *court could not.*

" 933, in 5th line of § 820, for "*hereon,*" read *thereon.* In the 3d line from the bottom of the same page, for "*a contract,*" read *contracts.*

There are numerous errors in punctuation, not noted here, which the reader will readily detect.

STATUTE

AND

CONSTITUTIONAL LAW,

AND

CONSTRUCTION OF STATUTES.

CHAPTER I.

ORIGIN AND HISTORY OF LEGISLATIVE AUTHORITY.

§ 1. Of all kinds and degrees of authority which man exercises over man that of legislation is the most august and supreme. A power of legislation, that is, the authority of enacting not only temporary and occasional ordinances, but durable and general laws, is, in the hands of a single person an alarming excess of dominion; hence in almost all modern governments, the sovereign power is divided among different and co-ordinate departments of government.

§ 2. The author of Parliamentary History has said that in all nations in the world hitherto known, and in all ages, the laws they were governed by, were first made by the advice and consent of general assemblies, and then promulgated to the whole community. In this he is probably mistaken; for such was not the character of the power exercised by the ancient Roman emperors in their *lex edictalis*, though they avowedly claimed it by a

grant from the people, conveyed in that instrument called "*Lex Regiæ*," and containing a formal surrender of their liberties, which had long before been extorted from them. This Roman instance of a single power of enacting stable and universal laws was the most absolute sovereignty that can in any country be actually traced.

§ 3. Gibbon is of the opinion that the primitive government of Rome was composed of an elective king, a council of nobles, and a general assembly of the people. War and religion were administered by the supreme magistrate, and he alone proposed the laws, which were debated in the senate, and finally ratified or rejected by a majority of the votes in the thirty *curia*, or parishes of the city. From Augustus to Trajan the modest Cæsars were content to promulgate their edicts in the various characters of a Roman magistrate, and in the decrees of the senate. Hadrian appears to be the first who assumed, (and without disguise,) the plenitude of legislative power. The same policy was embraced by succeeding monarchs, and, according to the harsh metaphor of Tertullian, "the gloomy and intricate forest of ancient laws were cleared away by the axe of royal mandates and constitutions." During four centuries, from Hadrian to Justinian, the public and private jurisprudence was moulded by the will of the sovereign. The origin of imperial legislation was concealed by the darkness of ages and the terrors of armed despotism; and a double fiction was propagated by the servility, or perhaps the ignorance of the civilians who basked in the sunshine of the Roman and Byzantine courts. To the prayer of the ancient Cæsars, the people or the senate had sometimes granted a personal exemption from the obligation and penalty of particular statutes; and each indulgence was an act of jurisdiction exercised by the republic over the first of her citizens. This humble privilege was at length transformed into the prerogative

of a tyrant; and the Latin expression of "released from the laws," was supposed to exalt the emperor above all human restraints, and to leave his conscience and reason as the sacred measure of his conduct. A similar dependence was implied in the decrees of the senate, which, in every reign, defined the titles and powers of an elective magistrate. But it was not before the ideas, and even the language, of the Romans had become corrupted, that a royal law, and an irrevocable gift of the people were created by the fancy of Ulpian, or more probably Tribonian himself; and the origin of imperial power, though false in fact, and slavish in its consequences, was supported on a principle of freedom and justice. "The pleasure of the emperor had the vigor and effect of law, since the Roman people, by the royal law, had transferred to their prince the full extent of their own power and sovereignty. The will of a single man, of a child perhaps, was allowed to prevail over the wisdom of ages, and the inclinations of millions; and the degenerate Greeks were proud to declare, that in his hands alone the arbitrary exercise of legislation could be safely *deposited*. The rescripts of the emperor, his grants and decrees, his edicts and pragmatic sanctions, were subscribed in purple ink, and transmitted to the provinces as general or special laws, which the magistrates were bound to execute, and the people to obey. But as their number continually multiplied, the rule of obedience became each day more doubtful and obscure till the will of the sovereign was fixed and ascertained in the Gregorian, the Hermogenian, and the Theodosian codes.

§ 4. In eastern countries, the ancient and established seat of despotism, the laws, properly so called, seem for the most part to have been immutable, by whatever authority they were originally framed, and the decrees of the monarch were chiefly perhaps of a temporary and occasional kind, and limited like modern royal proclama-

tions on some prior foundation, which gave them their validity. It was to the fact of the immutability of the decrees of Persian kings that the wicked enemies of the pious Daniel appealed, when the impious Nebuchadnezzar would have eluded the force of that nefarious decree against which Daniel so nobly dared to rebel.

§ 5. The history of the ancients affords many models of varied forms of government, as well as many sound and enlightened views as to the nature and true design of all human government. The government of Crete was at first monarchical, of which Minos has left us a perfect model. This enlightened statesman held, that the king had a supreme power over the people, but the laws supreme power over him. He had an absolute power to do good, but his hands were tied up from doing evil. That the laws entrust the people in his hand as the most sacred of deposits, upon the condition that he shall be a father to his subjects. That the same laws require that a single man by his wisdom, and moderation shall constitute the felicity of an infinite number of subjects; not that the subjects by their misery and abject slavery shall be subservient to the gratification of the pride and low passions of a single man. That it is not for himself that God had made him king; he is only so for the service of the people. He owes to them his whole time, care and affection, and is worthy of the throne only so far as he forgets himself, and devotes himself to the good of the public. In Crete, however, the authority of the king was of a very limited duration, and in accordance with Minos's intentions it gave place to a republican form of government. The senate, composed of thirty senators, formed the public council. In that assembly the public affairs were examined, and resolutions taken, but they were of no force till the people had given them their approbation and confirmed them by their suffrages. The magistrates, to the number of ten,

established for the maintaining good order, and therefore called "*Cosmi*," held the two other bodies of state in check and preserved the balance between them. In time of war the same persons commanded the army. They were chosen by lot, but only out of certain families. Their offices were for life, and they were not accountable to any one for their administration. Out of this company the senators were elected.

§ 6. In most of the states of Greece, the primordial ground of the government was that of a monarchy, that being the most ancient, and the most generally received plan, sanctioned and commended as it was by Plato, as the most proper to maintain peace and concord, and the most in accordance with the model of paternal authority. The severity of the monarch, or those who usurped the throne, the severity of masters, and the insurrections of the people, produced revolutions in those states, and enkindled a violent desire of liberty, and brought about a general change of government; and the ancient monarchical power yielded to a more republican form of government, as diversified in its features as there were different cities; each moulding and adapting to the spirit and genius of its own population. However there still remained some remnant of a monarchal government; enough to excite the ambition of those who loved seats of honor and power, and to excite in them a desire to become the masters of the people. In almost all the states of Greece individuals without any pretence of right to the throne, or fitness for the place, strove to advance themselves to it through intrigue, treachery, and violence, without regard to their own merits, or the supremacy or respect due to the law, and irrespective of the public good, seized upon and exercised the sovereign authority with a despotic empire and arbitrary sway. In order to keep up and sustain authority thus usurped in the outset, in the midst of distrust and fear on their

part of the populace, and on the other hand, on the part of the people of the usurper, they were induced to sacrifice to their own security those whom merit, rank, wealth, zeal for liberty, or love of their country rendered obnoxious to a suspicion of a tottering government, hated by all and respected by none. These usurpations and acts of cruelty gave to them, and justly too, the appellation of tyrants, and furnished ample ground, and opened a wide field for declamation by the orators of that age, and originated much of the tragical representations of the stage.

§ 7. Among the cities of Greece, Lacedemon and Athens were the most conspicuous; these peculiarly distinguished themselves, and acquired and maintained authority and superiority over other cities; and their genius, character, and government has excited the wonder and admiration of patriots and statesmen, in all ages since the record of their history has been the subject of contemplation and the theme for philosophical speculation.

§ 8. The monarchical government of Sparta, anterior to the age of Lycurgus, and at the time his sagacity, genius, and philosophical mind remodeled it, had fallen into a most distracted state. The authority both of the king and laws were absolutely despised, contemned, and disregarded, insomuch that it has been justly said, "No curb was strong enough to restrain the audaciousness of the people, which every day increased more and more." At this juncture of its affairs Lycurgus devised a plan for a reformation of their government. To qualify himself for the task, he acquainted himself with the different manners of other nations, and consulted the most able and experienced persons in the art of government. He visited the island of Crete, whose laws were famous for their harshness and severity, and studied the laws and customs of Asia, and from thence visited Egypt, the cradle of science, wisdom, and good counsels.

The new form of government which Lycurgus introduced into Sparta may be reduced to three principal institutions. The first, greatest, and most considerable was that of the senate, which is the only one I shall mention, except as subsequently modified. This was intended to temper and balance the too absolute power of the king, by an authority of equal weight and influence with theirs, and this became the principal support and preserving power of the state. This was deemed necessary, on the ground that the former system was ever unsteady and tended sometimes toward tyranny, by the violent and oppressive proceedings of the kings, and at other times towards democracy by the excessive and undue power and influence of popular will. It was thought that the senate would serve as a sort of counterpoise to both, and would keep the state in a due equilibrium, and preserve it in a firm and steady situation. The twenty-eight senators in the accomplishment of this end to secure such a result must have sided with the king when the people were grasping at too much power, and must have espoused the interest of the people whenever the kings attempted to carry their authority too far. The council consisted of thirty persons including the two kings. Lycurgus having thus tempered the government, those that came after him thought the power of the senate too strong and absolute, and as a check upon it they devised the authority of the Ephori, which was done in the reign of Theopompus, about 130 years after Lycurgus. This was composed of five in number, chosen annually out of the people, and in that respect resembled the tribunes of the people among the Romans. The authority of the Ephori extended to arresting and imprisoning of their kings; thus it will be perceived that the Spartan government was not purely a monarchal, nor was it a democracy. The nobility had a great share in it, yet the people were not entirely excluded. It has

been said by a historian of great renown, "each part of this body politic in proportion as it contributed to the public good found in it their advantage, so that in spite of the natural restlessness and inconstancy of man's heart, which is always thirsting after novelty and change, and is never cured of its disgust to uniformity, Lacedemon persevered for many ages in the strict observance of her laws."

Plutarch, in his life of Lycurgus, says, that Plato, Diogenes, Zeno, and all those who have treated of the establishment of a political state of government, took their plans from the republic of Lycurgus, with this difference, that they confined themselves wholly to words and theory, but Lycurgus, without dwelling upon ideas and speculative projects, did really and effectually institute an inimitable polity, and form a whole city of philosophers. In order to succeed in this undertaking, and to establish the most perfect form of a commonwealth that he could, he melted down as it were and blended together what he found best in every kind of government and most conducive to the public good. Thus tempering one species with another, and balancing the inconvenience to which each of them in particular is subject, with the advantage which resulted from their being united together. Sparta had something of the monarchal form of government in the authority of her kings. The council of thirty, otherwise called the senate, was a true aristocracy, and the power vested in the people of nominating the senators resembled a democratic government. The institution of the Ephori afterward served to rectify what was amiss in those previous establishments, and to supply what was defective. Plato thought the institution of the senate was advantageous both to the kings and to the people, as by this means the law became the only supreme mistress of the kings, and they never became tyrants over the laws.

§ 9. The government of Athens was not as permanent or uniform as that of Sparta, and often yielded to the exigencies of the times. It was originally, and for a long period, governed by kings, and afterward by archons, assumed entire liberty, which gave place for some years to the tyrannic power of the Pisistratida, but was subsequently re-established, and continued to subsist until the defeat in Sicily and the conquest of the city by the Lacedemonians. Its inhabitants were then subjected to the thirty tyrants, whose usurpation and tyranny induced the people soon to throw off the yoke and again to assert and resume their liberty, and to maintain the same until after many years of contest and struggle the Roman arms subdued Greece and reduced it to a Roman province.

Solon laid the foundation of their popular government, which consisted of the council or senate of five hundred, the assemblies of the people, and the different tribunals for the administration of justice. Solon was not however the originator of this plan, for it was devised by Theseus long before him, but the former adopted it and carried it into execution. After the union of the twelve towns into one city, he divided the inhabitants into three separate bodies, the nobility, the laborers or husbandmen, and the citizens. To the first he committed the religious affairs and offices of the nation. The government did not become a popular one until the establishment of the nine archons, whose authority only lasted for one year, having been reduced from that of ten. Solon's institutions gave to the people great share and authority in the government. Appeals might be brought to their tribunal in all cases, and they decided upon the cancellation of old laws and the enactment of new ones. Their historian thus succinctly describes their authority and form of procedure in the enactment of those laws: "In order that their determination should be made with more wisdom and maturity, Solon instituted a council composed of

four hundred senators, one hundred out of each tribe, which were then four in number, and they proposed and digested the affairs which were to be laid before the people. Clisthenes, about one hundred years after Solon, having increased the number to ten tribes, augmented that of the senators also to five hundred, and each tribe supplying fifty. This was called the council or senate of five hundred. They were chosen by lot, in which they made use of white and black beans, which were mingled and shaken in an urn, and each tribe gave in the names of those who aspired to that trust, and had the revenue required by the laws to qualify them for it. None could be admitted under the age of thirty. After enquiry made into the manners and conduct of the candidate, he was made to take an oath, whereby he engaged to give at all times the best counsel he could to the people, and never to depart in the least from the tenor of the laws. The senate assembled every day except upon days appointed for festivals. Each tribe in its turn furnished those who were to preside in it, called Prytanes, and this rank was decided by lot. This presiding continued thirty-five days, which being reckoned ten times amounts to the number of days except four of the lunar year, followed at Athens. This time of the presiding or prytanism, was divided into five weeks, regard being had to the five tens of the prytanes drawn by lot presided, each three days, and denominated Προεδροι that is, President. He who was so for three days, presided in the assembly of the senators, and in that of the people. He was charged with the public seal, and also with the keys of the citadel and treasury. The senators, before they assembled, offered a sacrifice to Jupiter and Minerva, under the additional appellation of givers of good counsels, to implore from them the prudence and understanding necessary to form wise deliberations. The president proposed the business which was to be done in the assembly. Every

one gave his opinion in his turn, and always standing. After a question had been settled it was drawn up in writing, and read with a loud voice, and each senator then gave his vote by scrutiny by putting a bean into the urn. If the white beans carried it the question passed, otherwise it was rejected. This sort of decree was in the nature of a preparatory resolution, as yet not having the force of a permanent law, and was called Ψηφισμα or Προβουλευμα It was afterward laid before the assembly of the people where if it was received and approved, it had the force of a law—if not, its authority subsisted only for one year. This shows with what wisdom Solon established this council to inform and direct the people, to fix their inconstancy, to check their temerity, and to impart to their deliberations a prudence and maturity not to be expected in a confused and tumultuous assembly, composed of a great number of citizens, most of them without education, capacity, or much zeal for the public good. The reciprocal dependency and mutual concurrence of the two bodies of the state, which were obliged to lend each other their authority, and remained equally without force when without union, and a good understanding were besides a method judiciously contrived for supporting a wise balance between the two bodies. The people not being able to enact anything without it being first proposed and approved by the senate, nor the senate to pass any decrees into a law until it had been ratified by the people. The kings were succeeded by the archons, and their authority rendered democratic in their main features, prior to the wise legislation of Solon, at the time he was chosen archon and was constituted sole legislator and supreme arbiter, with the unanimous consent of all parties; Athens was convulsed and distracted with as many different parties as there were different sorts of inhabitants in Attica. Those that inhabited the mountains were partial to a po-

pular government. Those of the low land desired an oligarchy, whilst those that dwelt upon the sea-coast desired a mixed government; whilst a fourth party, consisting of the poor, were determined to choose themselves a chief who should deliver them from the oppression of their rich creditors, whose debts they were unable to discharge. His mind and genius had to mould the government so as to meet the views, or reconcile the conflicting interests of all those varied factions. The success that attended this effort of this master spirit of the age, has excited the admiration, and elicited the eulogium of all succeeding ages. After the rebuilding of Athens in succeeding times under Aristides, the Athenians strove to introduce an absolute democracy, and a decree was then passed by which it was ordained that the offices of government should be open to all the citizens, and that the archons, who, as has been seen, were the chief magistrates of the commonwealth, and who had hitherto been selected out of the richest of its members, should for the future be elected indifferently from the general body of the Athenians, without distinction. Of the assemblies of the people, these were of two sorts, the one ordinary and fixed to certain days, for which no special summons was given; the other extraordinary or special, according to the different occasions that arose. In them all citizens, the poor as well as the rich, had an equal right of suffrage. All the great affairs of the republic were discussed in these assemblies. In them new laws were proposed and old ones amended or abrogated. All that related to religion and the worship of the gods was here examined; magistrates, generals, and officers chosen; peace or war conducted, treaties and alliances concluded, freedom of the city granted, rewards and honors decreed to those deserving of them, punishments ordained to violators of the law, and in fine, justice adminis-

tered, and judgment pronounced upon the most important affairs.

§ 10. Among all the nations of the earth none were more renowned for wisdom and politics than the Egyptians. This was the source from whence arts and science were derived. To this fountain-head it was that the most illustrious men of the ancient countries resorted in quest of human knowledge, and for the purpose of studying and copying its customs, manners, and laws, and cultivated an acquaintance with its philosophy and arts. Homer, Pythagoras, Plato, Mynoz, and even the great legislators Lycurgus and Solon, travelled thence to complete their studies, and draw from that fountain whatever was most rare and valuable in every kind of learning. The Egyptians were by nature grave, serious, and contemplative; and sought to study out the true ends of government, and to make life easy, and their people happy. The kingdom was hereditary, but according to Diodorus the Egyptian princes conducted themselves in a manner different from what is usually seen in other monarchies, where the prince acknowledges no other rule than his own arbitrary will, and pleasure. But their kings were under greater restraints than their subjects. Each monarch had certain laws enacted by predecessors, and digested among what was denominated their sacred books. The force of ancient customs was so strongly felt and exerted such a controlling influence, and things flowed so constantly in the same channel, that few new decrees or laws were originated, insomuch that a new custom in Egypt was a kind of miracle. Every thing was so well and firmly settled by ancient custom, that they never sought to live in a different way from their ancestors: hence there was neither occasion or necessity for much legislation. The principal duty of the sovereign power of the state was the administration of justice to their subjects; therefore the kings of Egypt cultivated more

immediately this duty and sought the ease and comfort of individual subjects and the prosperity and happiness of the state; being deeply impressed with the belief founded as it was in a philosophy no less sound than sagacious, that without this, the state would be but a herd of public robbers rather than a kingdom, should the weak be unprotected, and the powerful enabled by their riches and influence to commit crimes with impunity. Thirty judges were selected out of their principal cities which formed a body for dispensing justice through the whole kingdom. The prince in filling these vacancies chose such as were most renowned for their honesty, and put at their head him who was most distinguished for knowledge, and love of the laws, and was had in the most universal esteem.

To guard against surprise affairs were transacted by writing in the assemblies of the judges. The president of this senate wore a collar of gold set with precious stones, at which hung a figure represented blind; this being called the emblem of truth. When the president put this collar on it was understood as a signal to enter upon business. He touched with it the party who was to gain his cause, and this was the form of passing sentence. At the death of Tharader, A. C. 705, the Egyptians being unable to agree about the succession, were for two years in a state of anarchy, when at length, twelve noblemen conspiring together seized upon the government, and divided it among themselves in so many parts, each governing his own district, with equal power, and authority, but no one was permitted to invade or seize the dominion of the other. Thus they reigned harmoniously for fifteen years when they were conquered by Psammetichus, A. C. 670, who and his successors continued a regular line of kings for about one hundred and thirty-six years; when the history of that ancient kingdom became blended with that of the Persians and the Greeks until

after the death of Alexander; when a new monarchy arose in Egypt founded by Ptolemy the son of Sagus, which continued to Cleopatra a period of about 300 years.

§ 11. The Carthagenians derived their manners, customs and laws from the Tyrians, and their government has been thought to have been founded upon principles of the most consummate wisdom. Aristotle ranks it among those which were held in great esteem among the ancients. This opinion was founded upon the fact that for upward of five hundred years from its foundation, and until his day, no considerable sedition had disturbed the peace, nor any tyrant oppressed the liberty of the state. It united those different authorities which counterpoised and gave mutual assistance to one another. These authorities were that of the two supreme magistrates called Suffetes,---that of the senate and that of the people. To this was subsequently added the tribunal of one hundred, which had great credit and influence in the republic. The power of the Suffetes was only annual, and their authority in Carthage was similar to that of the consuls at Rome. The manner of their election is unknown. They had the power of convening the senate over which they presided, and propounded subjects for discussion, and received the votes. They also presided in all important debates. Their authority was not limited to the city, nor solely confined to civil affairs. It extended to the command of armies also. On the expiration of their employment as Suffetes, they were made prætors, which also empowered them to propose and enact new laws. The senate was composed of persons venerable on acconnt of age, their experience, their birth, their riches, and their merit, and it formed the council of state. Its number is not exactly known: it must have been large, as a hundred were selected from it to form a separate assembly. In the senate all affairs

of consequence were debated, letters from generals read, ambassadors admitted, alliances formed, and peace or war declared. The unanimous voice of the senate was supreme, from which no appeal lay. But in case of their disagreement, then the subject matter of such disagreement was laid before the people, who had the power of a decision of the question. To prevent the submission of questions of disagreement in the senate to the people, was not unfrequently an argument of great force in that body, and not unfrequently a prevailing one, by which the senate raised its authority to so great a heighth, and laid the foundations for its great power. Polybius says that while the senate had the administration of affairs, the state was governed with great wisdom, and was successful in all its enterprises; and Aristotle was of the opinion that the people spontaneously left the care of public affairs and the chief administration of them to the senate, and that it was attributable to this fact that the republic became so powerful and renowned among the ancients; but that the people afterward grew insolent by reason of their wealth, and forgetful of how much they owed to the senate for the blessings which they enjoyed, and hence became desirous of sharing more in the government, and arrogated to themselves nearly the whole power. This, according to the views of Polybius, was the ultimate cause of the ruin of Carthage.

The tribunal of the hundred was composed of one hundred and four persons, denominated, however, by the name of the hundred. Aristotle considered this tribunal the same as the Ephori in Sparta. There can be no doubt that it was designed in its institution as a counterbalance to the power of the nobles and the senate. The main difference between the hundred and the Ephori was, that the former was composed of a much greater numerical force, and their office was perpetual; while the latter was annually elected. These *centum*

viri are supposed to be the same as the one hundred judges mentioned by Justin, who were selected from the senate to inquire into the conduct of the generals. Isocrates says that in civil affairs the Carthagenian government was aristocratical; in military, royal; and this was probably the case in earliest times. The chief magistrates were called *suffetes*, which, in the Hebrew language signifies *judges*. But it appears from Aristotle that these judges or kings, who were two in number, were nothing more than annual magistrates, who convoked the senate and presided in that assembly. When the suffetes and the senate were of one mind, the people had no voice in public affairs, and only decided when they were divided in opinion; and he regards this as an imperfection in their constitution. In a commercial republic, where the people gradually become more rich, and more licentious, such a regulation naturally tended to throw too much power in their hands. During the century which elapsed from Aristotle to Hannibal, the people of Carthage became more powerful than the senate. At Rome the reverse was the case; for there, the senate was more powerful than the people; and to these circumstances chiefly the authors of antiquity ascribe the very different fortunes of the two nations in the ever memorable wars waged between them.

§ 12. The monarchical or regal government was preferred above all others by the wisest among the ancients. It met the approbation of Plato, Aristotle, Plutarch and Herodotus. It was likewise the only form adopted among the nations of the east. The Persians paid great honor and respect to the prince on the throne, for the reason that they regarded him as the vicegerent of God, and placed on the throne by the hand of the supreme governor of the world, and invested with his authority and power, in order to be the minister of his providence, and the dispenser of his goodness towards the people. Pagan-

ism sometimes carried this notion quite on the verge of extremes; yet Christianity has at all times fixed with greater precision the true limit to this point. The ancient sages not unfrequently allude to what they understand to be the true position. Thus, Tertulian has said, "we honor the emperor but in such a manner as is lawful for us and proper for him. That is, as a man who is next after God in rank and authority, from whom he has received all that he is and whatsoever he has, and who knows no superior but God alone." For this reason he calls the emperor in another place a "second majesty, inferior to nothing but the first." The Persians not unfrequently styled their prince the great king, the king of kings. It has been supposed that two reasons might induce those princes to take those very ostentatious titles. The one because the empire was formed of many conquered kingdoms, all united under one head. The other, because they had several kings their vassals, either in their court or dependent on them. The crown was hereditary among them, descending from father to son, and generally to the eldest. Absolute as the regal authority was among the Persians; yet it was in some measure kept within bounds by the establishment of a national council, appointed by the state, consisting of seven of the princes or chief lords of the nation, no less distinguished for their wisdom and abilities than by their illustrious birth. We are told in the Scriptures, (Ezra, vii. 14,) that Ezra was sent into Judea in the name and by the authority of king Artaxerxes and his seven counsellors. "Forasmuch as thou art sent of the king and of his seven counsellors." These counsellors were well versed in the laws, ancient customs and maxims of the state. They always attended the prince who never transacted any thing, or determined any affair of importance without their advice. This council had no power to control or interfere with the king's authority, having at

most a mere advisory power, yet such advice was usually so much respected as to be acquiesced in by the prince. Although they were under the direction of the sovereign and were dependent on him, yet they exerted a great check upon arbitrary power, and contributed much to the public order: and with them originated many of the wise regulations relative to their internal police, and external relations. To this council the king transferred from himself many weighty cares with which he must otherwise have been overwhelmed; and by them he likewise executed whatever had been resolved on. It was by this means that the great maxims of the state were preserved, the knowledge of its true interests perpetuated, its affairs carried on with harmony and order, and innovations, errors and oversights prevented.

The Persians kept public registers of all the edicts and ordinances of the prince, and all the privileges granted to the people, and all the favors conferred upon particular persons. They also kept the annals of the kingdom in which all the events of former kings, all resolutions taken, all regulations established, and service done by any particular person were exactly and circumstantially entered.

These annals were carefully preserved and frequently perused both by the kings and the ministers in order to acquaint themselves with time past, and that they might have a clear idea of the state of the kingdom, avoid arbitrary, unequal, and uncertain conduct, and maintain uniformity in the management of affairs. Josephus informs us that the kings of Persia used to administer justice in their own persons; and the Bible also affords us several instances in which justice was thus directly administered by the prince in his own person. To qualify them for the due discharge of this duty, they were early and publicly instructed in the laws of their country.

With the prince and his councillors was vested the legislative authority of the nation.

§ 13. The original government of the Jews was that of a Theocracy. It has been supposed by some and insisted that the government of God established among this peculiar people, was that of a monarchy. This position, however, has been most successfully refuted by other writers and it certainly is not to be collected from the records of the word of God. In the opinion of Calvin this government was aristocratical, instead of monarchal; and of the same opinion was Josephus, Philo and Moses Mainonidaz and the most and best of both Jewish and Christian authors. Josephus says that Saul's sin by which he fell, was that he took away the aristocracy, which could not have been done had it not previously existed. Philo imputes the institution among them of a kingly government to the fury of sinful people, rather than to the ordinance of God, or the mandates of his word. Aberland says, it proceeded from their delight in idolatry to which their neighbors were addicted, and which could be only upheld by a government in practice and principle contrary to that which God had instituted. Among the Hebrews, kings were not originally instituted by God, but were subsequently permitted on account of the sins of God's people. The precept in the laws (Deut. 17,) concerning kings is not in the nature of a command to make them, but rather instructions what manner of kings they should make, if they desired to have them. Moses, Joshua, and the other judges, had neither the name or power of kings: they were not of the tribe to which the sceptre was promised, nor did they transmit the power they had to their children, nor was it continued by any kind of regular succession, but it was transmitted to those fitted by temper and habit to deliver the nation out of their distress on given contingencies.

Hence we find that it was thus that Eliud, Gideon,

Jeptha and others, were set up; and on one occasion the promise of authority was made, to whomsoever would give battle to the children of Ammon should be head over the inheritance of Gilead. Thus was Jeptha made chief. Their government consisted of three parts: besides the magistrates of the several tribes and cities, they had a chief magistrate who was called judge or captain, a council of seventy chosen men and the general assembly of the people. The first was occasional, like the dictators of Rome, as the Romans in times of danger frequently chose such a man as was much esteemed for valor and wisdom. God's peculiar people had a peculiar regard to that wisdom and valor which was accompanied with his presence. The second was known as the great Sanhedrim, which was instituted by Moses by the command of God, and the third was the assembly of the people of which we find frequent instances in the Scriptures. In Joshua 22d, we learn that when the tribes of Reuben and Gad, and half of that of Manasseh had built an altar, on the side of Jordan, the whole congregation of the children of Israel gathered together at Shiloh, to go up to war against them. Thus it will be perceived, that this was the exercise of the highest and most important act which could concern the people, that even of war and peace; and that too with their own brethren while Joshua was still alive. It is evident that this whole transaction, was determined upon and settled by the assembly of the people, for we are told *they sent* Phineas. This embassy was not only thus democratically sent, but it was also equally democratically received. It was directed to all the children of Reuben, Gad and Manasseh, and the answer was sent by them all. One of the last eminent acts performed by Joshua himself, was the calling a like assembly to Shechem, composed of elders, heads of families, judges, officers, and all the people: and they agreeing, made a covenant before the Lord.

The like assembly was gathered together for the election of Saul, and every man was there; and though the elders only, are said to have asked a king of Samuel, yet they it seems were deputed from the whole congregation, for God said "Hearken to the voice of the people." In the same manner the tribe of Judah, and after that the rest, chose and anointed David to be their king; and after the death of Solomon all Israel met together to trial with Rehoboam, and ten of the tribes abrogated his kingdom. It has been said if these actions were considered singly, the Hebrew government might have been called a democracy, as well as that of Athens; for without doubt they evidently manifested the supreme power to have been lodged in those general assemblies of the people. But the government as to its outward order consisting of those three parts, which comprehended three simple species and no times having been appointed nor occasion specified upon which judges should be chosen, or these assemblies called, whereas the Sanhedrim which was the aristocratical part was permanent, the whole might rightly be called or considered as an aristocracy.

CHAPTER II.

§ 14. The Anglo Saxon legislation commenced under Ethelbert, king of Kent; who was the Bretwalda or superior chief of the several Anglo Saxon kings, south of the Humber. A code of laws was then compiled, of which but an imperfect transcript has come down to our days. The ancient German customs which had until then been continued in use, were then reduced to a system and promulgated in the form of laws. Bede considers the first act of legislation as having been done in imitation of the Romans. The king in the style of a Roman Emperor, decreed or enacted; and his council or Witans advised. Previous to their migration into Britain and the adjoining continent, no chief, so far as has been discovered, ever claimed or exercised any such authority. This assumption of authority, was followed throughout the whole of the Anglo Saxon and the Danish period of the history of Britain. Its remains are plainly discoverable in the forms of enactment at a much later day. The functions of the councils which were held under the Anglo Saxon sovereigns were partly judicial, and partly legislative. Tacitus informs us that the chiefs or leaders of the ancient German tribes decided on affairs of smaller moment, but that the whole body of the people deliberated in matters of weightier concern. In the earlier history of each of the states which were formed by their descendants, traces of this ancient custom may be discovered. It appears that the ancient form of deliberations continued. The king or the optimates proposed the subject for debate and they alone joined in the discussion. There are also some indications of the

sense of those of the community who did attend, having been still expressed in the ancient mode, and the remembrance of those customs doubtless influenced the language of public acts even when the people had altogether ceased directly to interfere. In later times as the predominant kingdoms extended their territories, and particularly as regards England, when the kingdoms of the octarchy were united into one empire, the assembly of the whole body of the thanes became impossible; and whatever were the functions which were originally exercised by the entire body, the whole naturally fell into the hands of a few. As the functions of this tribunal partook both of judicial and legislative authority, to ascertain precisely the boundaries of each, in the assemblies of the Anglo-Saxons, after the union of the different states into one kingdom, is a most difficult task. As it regards legislation from the time of the conversion of the Anglo Saxons to Christianity, the prerogative of the crown seems to have been exercised with the advice of his council. Two of these councils are plainly discernible though not always to be distinguished. They formed the basis of the great councils and select councils which were held under the conqueror and his successors, and the remains of which are to be discovered in the house of Lords, and the privy council at the present day under the English Constitution. The king's council of either kind were constituted of the superior order of the king's vassals, together with Archbishops and Bishops, and Abbots of the principal monasteries. In some instances such as the king especially summoned for the occasion, even members of the clerical body of inferior rank, eminent for their attainments, might be selected as members of the king's council. The persons who acted as the council of the king are usually designated in the Anglo Saxon documents as *Witan aldones;* or by some such expressions; sometimes as Edistan Witan. In the Latin

charters they are described by the names of Principes, Senators, Conciliarii, Archontes, Pretors, but most commonly Proceres, or Optimates, a phrase which had been applied to those Romans of senatorial rank as distinguished from the Plebs. It seems that no lay man could be selected as one of the Optimates or council unless he were in the enjoyment of forty hydes of land. It is seldom that any public act of the Anglo Saxon kings is recorded without its being stated to have been done with the consent or the advice of the optimates, or proceres, or some of them. As many, sometimes all of the optimates would be present at the courts of the state, it was natural that those assemblies should be made use of for the transaction of such business, as the proceres or witan usually advised upon, and such accordingly appears to have been the fact. Doubtless many persons who were in attenddance at the courts of the state in virtue of their offices not qualified as members of the councils attested the acts as witnesses: indeed there are numerous instances of that kind. As to the nature and constitution of the assemblies of the council which were convened for the dispatch of public business on other occasions, we are left in much doubt: so much must have depended on the urgency of the business, the state of times, the character and influence of the sovereign, and many other circumstances that in all probability, no uniform rule prevailed. From the numerous charters granted by the kings to the church and to their vassals, which are dated from the different royal villas or manors in which they resided in their progress through their dominions, it would appear that there was always a certain number of the optimates in attendance on the king to obey his summons, to act as his council when circumstances required it. This may have been what afterwards appears as the select council. Many acts of state emanated from this council ; but more solemn assemblies of the opti-

mates or Ge Witena gemotes were frequently called embracing sometimes all, sometimes the most distinguished of the optimates; on some occasions the "best men" in the land is the expression used. These more solemn assemblies appear to have been held in the open air by public notice, or by particular summons in or near some city or populous town. These are the assemblies which are called parliaments by the writers after the conquest. It appears to have been the business of the select council which usually attended the king, or the select council as it may be called, to determine when those more solemn councils should be held. On some occasions when the throne was vacant these assemblies met on their own authority for the purpose of choosing a sovereign. Laws were framed and enacted at the councils assembled whether as courts of the state, or by special summons: but as before stated the enactments were almost universally in the name of the king, and this was continued by William the Conqueror and his successors. The Conqueror indeed on these occasions asserted the kingly authority in the most positive terms, "mando et regia authoritate præcipio." After the laws had ceased to be enacted in the presence of the assembled people, writs were sent to the different earles or lieutenants of counties, in which the laws were embodied, so that the ordinances made at the councils might be known both to rich and to poor, and this constituted the mode of publication in those early days.

In the early period of the juridical history of England their laws were ordinarily known by the name of *assisæ* or *constitutiones*: the king usually provided and ordained them.(*a*)

The laws or *assisæ* so called are in the laws of England distinguished into those made before the time of

(*a*) Dwarris, 625.

memory, and those made since. The time of memory was fixed in conformity to a provision made in the time of Edward 1st for setting the limitation in the writ of right, which was by statute 1st West. c. 39, fixed at the beginning of the reign of Richard.

Although the limitation in a writ of right has been long since altered, this period has been chosen as a distance of very high antiquity, at which has been fixed *the time of memory*, as it is called, so that in England even at this time every thing before that period is said to have happened before the time of memory.

Those statutes which were made before this time, and which have not been since repealed nor altered by contrary usage or by subsequent acts of parliament, are considered as part of the *leges non scriptæ;* being considered now as in fact incorporated into and as having become a part of the common law of England; notwithstanding copies of them may be found at the present time, their provisions are usually considered that of the sovereign.

Several laws even as late as Henry the 2d and in the reigns of Richard and John, vouch no other sanction but "*rex constituit*" or "*rex præcepit*" for everything they command or direct. Much of the early history of English statutes is no doubt involved in obscurity from the great difficulty of interpreting ancient records in which reference was not unfrequently made to antecedent documents written in language different from that of the originals and in many instances even in different parts of the same document a change of language occurs where the same circumstances in fact were intended to be stated. These defects in ancient statutes originate to a certain extent from the habits of the age where much was done without the formalities of any written record preserved, to which access is at this late age to be had, and partly from the disturbed state of the country for some time after the advent of William the first, and from the

disorders which prevailed in several subsequent reigns. Perhaps there is no better way of accounting for the extraordinary appearance of the old statutes than by supposing that it remained with the king to supply the defects which occasionally appeared in the course and order of proceeding; which being founded originally on custom and usage, was, in its nature, more susceptible of modification than any positive institution, that not as acts of parliament but as immemorial usage and custom from which there is no doubt much of the common law of England is derived.

§ 16. It has already been remarked that the laws were termed sometimes "*assisæ*," and sometimes "*constitutiones*." The most solemn and usual way of ordaining laws was to get the concurrence of the *commune concilium regni*, yet it seems that in these times the king took upon himself to do many legislative acts, which when conformable with the established order of things were easily acquiesced in, and became the law of the land. The very frame indeed of such laws as were sanctioned with all possible formalities, carried in them the strongest appearances of regal acts: if a law passed *concilio baronum suorum*, it was still *rex constituit*. Of the laws of William the Conqueror, though in some parts they seem to have the authority of the great council, *statuimus*, *volumus*, *præcipimus*, yet in others they speak in the person of the king only, *hoc quoque præcipio, et prohibeo*. The form of a charter, in which the king was considered as a person granting, was a very common way of making laws at this time, and carries with it evidence of the sentiments entertained in those ages concerning legislation. It should be remarked that some of these charters, from the solemnities attending the execution of them, might be regarded as having all the solemnities of valid laws as in some of them the barons of the realm seem to have been parties. Others seem to have no authority but

could not be easily tampered with, without a manifest discovery of the change.

§ 17. In an unlettered age, it was convenient and beneficial, that the king should exercise such a superintendence over the laws as to declare, explain and direct what his justices should do in particular cases; such directions were very readily received as positive laws, always to be observed in future, and no doubt numbers of such regulations were made of which at present there remain no traces. While this supreme authority was exercised only in furtherance of justice, by declaring the law, or even altering it in instances which did not much entrench upon the interest of the great men of the kingdom, it was suffered to act at freedom. But no alteration in the law which affected the persons or property of the barons, could be attempted with safety, without their concurrence in making it, as in deed it could not always be executed without the assistance of their support. Thus it happened that when any important change was meditated by the king a *communi concilium* was summoned where the advice of the magistrates was taken, and then the law if passed was mentioned to be past with their concurrence. On the other hand, had the nobles any point which they wanted to be authorized by king's parliamentary concurrence a *commune concilium* was called if the king could be prevailed to call one, and if the matter was put into a law, the king here was mentioned to have commanded it at the prayer and request of his barons, so that one way or the other the king is mentioned in all laws, as the creative power which gives life and effect to the whole.

§ 18. As laws made in the solemn form by a *commune concilium*, were upon points of great importance, and often the subjects of violent contests; they were in the nature of concords or compacts between the parties interested and were sometimes passed and executed with the

ceremonies suitable to such a transaction. The constitutions of Clarendon, (which too are called the ancient law of the kingdom and therefore only to be declared and recognized as such,) were passed in that way.

Becket and all the bishops took an oath to observe those laws; and all except Becket signed and put their seals to them. The laws were drawn in three parts, one counterpart or authentic copy was given to Becket, another was delivered to the Archbishop of York, a third was retained by the king to be enrolled among the royal charters.

The Magna Charta of King John was executed with similar solemnity and bore a similar appearance of a compact between the king and his nobles.

It was not uncommon that the people as well as the makers should be sworn to observe the laws. The *assisæ statutæ et juratæ* are mentioned by Bracton as an article of inquiry before the justices in Eyre in the reign of Henry the third.(*a*)

§ 19. It may not be amiss at this point to digress for a moment and inquire into the origin of the British Parliament. Edward the first who has been justly denominated "the English Justinian" was possessed of great natural talents, and succeeding to a prince whose weakness and injustice had rendered his reign unhappy, being sensible that nothing but a strict administration of justice could, on the one side curb a nobility whom the troubles of the preceding reign had rendered turbulent; and on the other appease and reconciliate the people, by securing and guarding the property of individuals. To this end he made jurisprudence the principal object of his attention, and insomuch did it improve under his care that the mode of process became fixed and settled. It is during his

(*a*) Reeve's English Law, Vol. 1, p. 215, 216, 217, 218; Steven's Eng. Const. Vol. 1 p. 5.

reign in which we find the first instance of the admission of deputies of towns and boroughs into Parliament.

Edward continually engaged in wars, either against Scotland or on the continent, seeing his demesne considerably diminished, was frequently reduced to the most pressing necessities. But though in consequence of the spirit of the times, he frequently indulged himself in particular acts of injustice, yet he perceived that it was impossible to extend a general operation on a body of nobles, and a people who so well knew how to unite in a common cause. In order to raise subsidies, he was obliged to employ a new method, and to endeavor to obtain through the consent of the people, what his predecessors had hitherto expected from their own power. The sheriffs were ordered to invite the towns and boroughs of the different counties to send deputies to parliament, and it is from this era that we are to date the origin of the house of commons. No writs can be found to summons knights and burgesses and citizens to parliament before the year 1264, 49 Henry III. Knights of Shires were, however, summoned under King John. In 1283, Edward I. held a parliament at Shrewsbury where the lords sat in a castle and the commons in a barn. In 1337 the lords and commons met at Eltham, in Kent, in the palace of Edward II., the remains of which are still extant. It is certainly a question when the commons first formed a distinct assembly from the lords. Parliament or general councils have existed from the earliest period of British history; the word is derived from the French *parler*, to speak, because it is a deliberative assembly and means the great council of the nation. They have existed in the early ages under various names. The Saxons called these councils *synoth* or *michel synoth*, the great council, or great synoth, because they were of a religious character; also *michel gemoth* or *gemote*, the great assembly and *wittena gemoth* the assembly of wise men. After the conquest

they were called by the latin names of *commune consilium regni*, *magnum consilium regis*, *curia magna*, *conventus magnatum vel procerum*, *assisa generalis*, and sometimes *communitas regni Angliæ*,(*a*) and finally *parliamentum* which was the name last adopted. Mr. Barrington in his remarks upon the more ancient statutes(*b*) observes in contradiction to lord Coke's Etymology of the word "parliament, as being composed of the words *parler la ment*," to speak one's mind, that it was a compound of two Celtic words, *parley* and *ment* or *mend* both of which are to be found in Bullet's Celtic Dictionary published at Besancon in 1754. He renders parley by the French infinitive *parler*, and we use the word in the English as a substantive *viz.*, *parley* and *ment* or *mend* is rendered *quantite abondance*. And he concludes that the word *parliament*, therefore, being resolved into its constituent syllables may not be improperly said to signify what the Indians of North America call the *great talk*. The word *parliamentum*, it is universally admitted was not used in England, till the reign of Henry III., which is contrary to the assertion of Lord Coke,(*c*) that the word was in use before the conquest.(*d*) It is generally supposed that the origin of the house of commons may be dated from the 17th King John ; (1215) but the institution of parliament is involved in great obscurity. In the first report of the lords' committees upon the peerage, will be found the result of their lordships' inquiries as to the constitution of parliament, and for what purpose it was originally summoned : but it is one of those matters, to use the words of Blackstone, which "lie so

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(*a*) Glanvil, liber 13, C. 32. L. 9, C. 10 ; 2d Inst. 256.

(*b*) Barr. p. 48.

(*c*) Co. 1 Inst. 110, *a* ; Co. 2 Inst. 156 ; 1 Com. 147.

(*d*) Co. 4 Inst. 12 ; Prynne's An. 4 Inst. 2, Christian's note ; 1 Blackstone's Com. 147 ; Taylor's Civil Law, 70.

far hidden in the dark ages of antiquity, that the tracing of it out is a thing equally difficult and uncertain."

As an illustration of this obscurity, the magna charta of Henry III. omits the following clause which is in the magna charta of King John. "That no scutage shall be imposed on the people unless by the consent of the *commune consilium.*

The first writ of summons to elect and send knights and burgesses to parliament, was issued 49 Hen. III. It must be confessed, however, that these deputies of the people were not at first possessed of any considerable authority: they were far from enjoying those extensive privileges which, in these days, constitute the house of commons a collateral part of the government; they were in those times called up only to provide for the want of the king, and approve of the resolutions taken by him, and the assembly of the lords. But it was nevertheless a great point gained to have obtained the right of uttering their complaints, assembled in a body and in a legal way; to have acquired, instead of the dangerous resource of insurrections, a lawful and regular means of influencing the motions of the government, and thenceforth to have become a part of it. Whatever disadvantage might attend the station at first allotted to the representatives of the people, it was soon to be compensated by the preponderance the people necessarily acquire when they are enabled to act and move with method, and especially with concert.

And indeed this privilege of naming representatives, insignificant as it might then appear, presently manifested itself by the most considerable effects. In spite of his reluctance, and after many evasions unworthy so great a king, Edward was obliged to confirm the great charter; he even confirmed it eleven times in the course of his reign. It was moreover enacted, that whatever should be done contrary to it should be null and void;

that it should be read twice a year in the cathedrals; and that the penalty of excommunication should be denounced against any who should presume to violate it. At length he converted into an established law a privilege of which the English had hitherto had only a precarious enjoyment; and in the statute *de Tallagio non concedendo*, he decreed that, no tax should be laid, nor impost levied, without the joint consent of the lords and commons; a most important statute this, which in conjunction with magna charta, forms the basis of the English constitution. If from the latter the English are to date the origin of their liberty, from the former they are to date the establishment of it; and as the great charter was the bulwark that protected the freedom of individuals, so was the statute in question the engine which protected the charter itself, and by the help of which the people were thenceforth to make legal conquests over the authority of the crown. The representatives of the nation, and of the whole nation, were now admitted into parliament; the great point, therefore, was gained that was one day to procure them the influence which they at present possess; and the subsequent reigns afford continual instances. In the first report of the lords' committee upon the peerage, p. 252, the committee state, that the first solemn act which they had discovered, by which the constitution of the legislative assembly of the realm was distinctly described, after the charter of king John, was a statute passed in the 15th Edward II., where it is declared "that the matters to be established for the estate of the realm, and of the people, should be treated, established, and accorded in parliament by the king, and by the assent of the prelates, earls, and barons, and the commonalty of the realm, according as had been before accustomed." This committee also state, that the provisions of the charter of king John, about summoning the *commune concilium*, appears to have been abandoned, and

probably did not extend to all legislative purposes, but only to that of granting aid. Under Edward II. the commons began to annex petitions to the bills by which they granted subsidies: this was the dawn of their legislative authority. Under Edward III., they declared they would not, in future, acknowledge any law to which they had not expressly assented. Soon after this, they exerted a privilege, in which consists, at this time, one of the great balances of the Constitution: they impeached and procured to be condemned some of the first ministers of state. Under Henry IV. they refused to grant subsidies before an answer had been given to their petitions. In a word, every event of any consequence was attended with an increase of the power of the commons; increases, indeed, but slow and gradual, but which were peaceably and legally effected, and were the more fit to engage the attention of the people, and coalesce with the ancient principles of the Constitution.

Under Henry V. the nation was entirely taken up with its wars against France; and in the reign of Henry VI. began the fatal contests between the houses of York and Lancaster. The noise of arms alone was now to be heard: during the silence of the laws already in being, no thought was had of enacting new ones; and, for thirty years together, England presents a wide scene of slaughter and desolation. At length under Henry VII., who, by intermarriage with the house of York, united the pretensions of the two families, a general peace was re-established, and the prospect of happier days seemed to open on the nation. But the long and violent agitation under which it had laboured, was to be followed by a long and painful recovery. Henry assuming the throne with sword in hand, and in a great measure as a conqueror, had promises to fulfil, as well as injuries to avenge. In the mean time, the people, wearied out by the calamities they had undergone, and longing only for

repose, abhorred even the idea of resistance; so that the remains of an almost exterminated nobility beheld themselves left defenceless, and abandoned to the mercy of the sovereign. The commons, on the other hand, accustomed to act only a second part in public affairs, and finding themselves bereft of those who had hitherto been their leaders, were more than afraid to form of themselves an opposition. Placed immediately, as well as the lords, under the eye of the king, they exposed themselves to the same dangers. Like them, therefore, they purchased their personal security at the expense of public liberty; and, in reading the history of the first two kings of the house of Tudor, we imagine ourselves reading the relation given by Tacitus of Tiberius and the Roman Senate(*a*)—"*Quanto quis illustriori tanto magis falsi ac festinantes.*"

§ 20. The earliest statutes extant in the printed statutes of England, are those of Henry III.(*b*)

The sources of information begin at this period to be more authentic. We have in this reign some statutes enacted by the legislature, besides the charter of liberties and the charter of the forest. These statutes are either to be found in the rolls in the tower, or in some memorials which have delivered them down to us as acts of parliament, and, therefore, their genuineness is not to be questioned. Many parliaments were holden in this long reign, and it has been thence inferred, that many acts of course have passed which have not reached our time, though it is remarkable that Bracton, except in four or five instances, quotes no statutes but those which are now extant. So destructive has the hand of time been, that only two of those few we have, are to be found on

(*a*) De Lolme, 21 to 28; 33 to 35.
(*b*) Dwarris, part 2. ch. 10, p. 626.

record. The only statutes of this reign to be found on the statute roll, are *magna charta* and *charta de foresta*. The rest are not on record, but only preserved in books and memorials. Such are the statutes of Merton and Marlbudge. This distinction of ancient documents has given rise to the following position: that notwithstanding the record itself be not extant, yet general statutes made within the time of memory, that is, since the first Richard, do not lose the force of statutes, if any authentic memorials of there being such are to be found in books, seconded with a general received tradition attesting and approving the same. In conformity, perhaps, to this favourable presumption it has become a rule, that courts are to take notice of general acts of parliament, without pleading them; for statutes are never to be put in issue of *nul tiel record*, but are to be tried by the courts, and if there be any difficulty or uncertainty, the Judges are to make use of ancient copies, transcripts, books, pleadings, or any other memorials, to inform themselves. In 8 Co. R. 28, it was resolved, that against a general act of parliament, or such an act whereof the judges and officers ought to take notice, the other party cannot plead *nul tiel record*, for of such an act the judges ought to take notice; and in that case it was said, "God forbid if the record of such act be lost, or consumed by fire or other means, that it should tend to the general prejudice of the commonwealth, but rather, although it be lost or consumed, the judges, either by the printed copy or by the record in which it is pleaded, or by some other means, may inform themselves of it."

The statutes of this reign, which are now in being are to be found in the common editions of the statutes. The statutes from *Magna Charta* down to the end of Edward II., including also some, which because their period is not ascertained, are termed *in certi temporis*, are sometimes called the *Vetera Statuti*. Those from the begin-

ning of the reign of Edward III. being contra-distinguished by the appellation of *Nova Statuti.*(*a*)

§ 21. In most of the ancient free states, the share of the people in the business of legislation was to approve or reject the propositions which were made to them, and to give the final sanctions to the laws. The functions of those persons, (or in general, those bodies,) who were intrusted with the executive power, was to prepare and frame the laws, and then to propose them to the people: and in a word, they possessed that branch of the legislative power which may be called the initiative, that is the prerogative of putting that power in action.

The initiative, or exclusive right of proposing in legislative assemblies, attributed to the magistrates was indeed very useful, and perhaps even necessary, in ancient republics, for giving a permanence to the laws as well as for preventing the disorders and struggles for power which have been mentioned before. This power of previously considering and approving such laws as were afterwards to be propounded to the people, was, in the first times of the Roman republic, constantly exercised by the senate: laws were made, *populi jussu ex auctor senatus.* Even in cases of elections, the previous approbation and *auctoritas* of the senate, with regard to those persons who were offered to the suffrages of the people, were required. "*Tum enim non quebat is magistratum qui caperat si patus aucto res non erant facti.*"(*b*)

§ 22. At Venice the senate also exercised powers of the same kind, with regard to the grand council or assembly of the nobles. In the canton of Berne, all propositions must be discussed in the little council which is composed of twenty-seven members, before they are laid

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(*a*) Reeves, vol. 2, p. 84.

(*b*) Cicero pro Plancio.

before the council of two hundred, in whom resides the sovereignty of the whole canton. And in Geneva the law (was) "that nothing shall be treated in the general council or assembly of the citizens which has not been previously treated and approved in the council of the two hundred: and that nothing shall be treated in the two hundred which has not been previously treated and approved in the council of the twenty-five."(*a*)

In almost all the ancient states of Europe, the will of the prince held the place of law, and custom so confounded this matter of right with the matter of fact, that many writers represent the legislative authority as essentially attached to the character of king, and the plenitude of his power seemed in their estimation to flow from the very definition of his title;(*b*) and there are not wanting instances in the history of England's kings, where even kings themselves have arrogated to themselves this high prerogative. James I. indeed, claimed that his prerogative was absolute and unlimited; that the concurrence of parliament was not necessary in any of the acts of government, and that all the privileges of the people, were mere voluntary concessions made by his ancestors, which he might revoke at pleasure; these were propositions which he not only maintained, but which he would not suffer to be questioned. "As to dispute," says he, "what God may do, is blasphemy; so it is seditious to dispute what a king may do in the height of his power." Even the judges, when called upon, in the execution of their duty to decide between the king and the people, were prohibited from canvassing the rights of the crown. "Deal not," says his majesty, "in difficult questions before you consult with the king and council, for fear of

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(*a*) Stev. Eng. Con. Vol. ii., ch. 4, pp. 827, 828.
(*b*) Stev. Eng. Con., fol. 2, ch. 4, p. 531.

wounding the king through the sides of a private person. The absolute prerogative of the crown, is no subject for the tongue of a lawyer, nor is it lawful to be disputed."(*a*)

In modern times, however, it has been the aim of the English government not to leave the laws at the disposal of the king. The basis of the English Constitution, the principle on which it depends is, that the legislative power belongs to the parliament alone; that is to say, the power of establishing laws, and of abrogating, changing, or explaining them.

§ 23. The constituent parts of parliament are the King, the House of Lords, and the House of Commons.(*b*) But neither the king nor his privy council can make any amendment in the bills preferred by the two houses, he having merely the right to accept or reject such laws as shall be passed by the parliament. In the beginning of the existence of the house of commons, bills were presented to the king under the form of petitions. Those to which the king assented were registered among the rolls of parliament, with his answers to them, and at the end of each parliament the judges framed them into statutes.

Several abuses having crept into this method of proceeding, it was afterward ordained that in future cases, the judges should make the statutes before the end of each session, to the end that parliament might detect, and if need be, correct any errors occurring therein. In process of time, it was found that even this was insufficient, and then the present method of framing bills was established, so that now the practice is in England as in this country, that both houses frame the statutes in the

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(*a*) Miller's Eng. Gov., Vol. i., sec. 1, pp. 153, 154.

(*b*) Stev. Eng. Con., Vol. ii., p. 531.

very form and words in which they are to stand when they receive the royal assent.

It is the practice of the king, as it is of the executive in this country, to send messages to either house. These messages are very different now from what they were anciently, being generally expressed in very general words; instead of being directory, they are only made to desire the house to take certain subjects into their consideration. No particular clauses are expressed; the commons are not to declare at any stated time, their acceptance or rejection of the proposition made by the king, but they follow the same modes of proceeding as are pursued in relation to petitions presented by private individuals. Some member usually makes a motion upon the subject expressed in the king's message; a bill is framed in the usual way; and such bill, like any other, may be dropped at any stage of it: in short, it is treated not as the proposal of the crown, but as the motion of some of their own members, which the house discusses, and finally accepts or rejects.(*a*) The bill when passed both houses, is presented to the king for his royal assent: those bills which he rejects remain without force, and those to which he assents are incorporated into the statutes of the kingdom, and thereafter treated as the express will of the highest power acknowledged in England. They have the same binding force as the *edits en registies* have in France, and as the *populis-cita* had in ancient Rome. And although each of the constitutent parts of parliament might, at the first, have prevented the existence of those laws, the united will of the three, when once enacted, is necessary to repeal them.(*b*)

(*a*) Stev. Eng. Con., Vol. ii., ch. 4, pp. 831, 832.
(*b*) Stev. Eng. Con., Vol. ii., ch. 4, p. 537.

§ 24. This much of the origin and history of statutes in England was deemed proper to incorporate into this treatise as a source of some degree of information to the legal student; a further prosecution of this branch of the subject, is incompatible with the object and design of this work.

It only remains to state in a few words what efficacy is attached to statutes when thus framed in England. A statute when clothed with all the solemnities of a law of the kingdom, it is said hath power to bind every subject of the realm to which legislative authority extends, and under the forms of government there existing: it binds the king if therein particularly named, although it is true as a general rule, that the king is not to be restrained of a liberty or right he before possessed by the general words of an act of parliament, unless he is expressly named in such act; but if the statute be intended to give a remedy against a wrong,(*a*) to punish frauds,(*b*) tortius usurpations, or the decay of religion, the king, though not named, shall be bound by it. So, too, although not named expressly, he is bound by an act for the advancement of religion or learning, or for providing for the poor.(*c*) So also was an act of parliament for the consolidation of endowed rectories and vicarages, held to bind the crown, though not named.(*d*) If an act spoke of the king generally and indefinitely, being named in a public capacity, it extended to all his successors, and to a queen, if the crown descended to a female.(*e*) A statute being regarded as the highest authority that government acknowledged on earth,(*f*) it has been held that

(*a*) 3 Inst. 618.
(*b*) 5 Rep. 14.
(*c*) Steph. Elec. L., p. 11.
(*d*) 1 Strange, 516.
(*e*) 11 Report, 110.
(*f*) 1 Blacks. Com. 185.

it could discharge a person from his allegiance, and restore him to a state of nature; it could make his estate to cease in the same manner as if the party possessing it were dead:(*a*) it even has been said, that it could do no wrong; yet Lord Holt has quaintly said, "That it may do several things that look pretty odd:" it can make Malta in Europe, and can make a woman a mayor, or a justice of the peace;(*b*) but it cannot change the laws of nature so as to make a woman a man, or a man a woman.(*c*) It can dissolve a marriage and enable the adulteress to intermarry with her paramour;(*d*) it can enable a man to have or be an heir, who could not otherwise have or be an heir.(*e*) So an estate tail may be limited by a statute, without a dower, and the validity of such a limitation is not in such case to be measured by the rules of common law, for the reason that a statute can control those rules:(*f*) it can confirm conveyances defectively executed, and statutes for that purpose must be carried into effect. It may also, upon the request of parties, owners of real property, limit and vest their estates as they desire, or as they could do by deed.(*g*)

§ 25. But whenever a statute which limits an estate in real property is inconsistent with the estate granted by a prior deed, its effect is not merely to cure formalities in its execution, but it must be held to create a new estate.

The parliament of England can regulate or new model the succession of the crown, as it did in the reign of Henry the VIII. and William the III. It can alter the

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(*a*) Midway's Case, 6 Rep. 48.
(*b*) 2 John, 12.
(*c*) Steph. Elec. L., p. 110.
(*d*) 12 Mod. 88.
(*e*) 1 Lev. 75.
(*f*) 251 John, 105; Raym. 355; 2 Dwarris, 668.
(*g*) *Lessees Delany and Wife* v. *Tilghman*, 6 Gill. & J. 461.

established religion of the land, as was done in a variety of instances in the reign of Henry the VIII. and his three children; it can change and create afresh, even the constitution of the kingdom, and of parliament itself, as was done by the act of the union, and the several statutes for biennial and septennial elections. In short, it is even claimed that it can do every thing which is not naturally impossible.(*a*) That it is clothed with all the legal attributes of omnipotence in the scale of political existence.

The extent and qualifications of this last assumption will come under review in a succeeding chapter.

(*a*) Steph. Elect. L., Vol. i. p. 11.

CHAPTER III.

§ 26. Having thus adverted to the legislative power of England, its origin, progress, and efficacy, it is proper that we should advert to some of the prominent facts connected with the origin of legislation in the United States. In doing so, it will become necessary to have recourse to the history of some of our early colonial governments. In doing so, however, the design of this treatise will necessarily restrict us to a consideration of only so much of the colonial history as relates to the subject of political power and legislation. Nor shall we be able to trace the origin, rise and progress of legislation in more than three of the colonies, to wit: those of Virginia, Massachusetts and Connecticut.

The first in order is that of Virginia. Under the charter of James the Ist, granting certain parts of the country to two colonies, subsequently known as that of Virginia and Plymouth, the political power of government was vested in a local council appointed and renewable by the crown; legislative as well as executive power was vested in the president and council of the colonies, subject to the restriction touching ordinances as to life or limb, and that their enactments were to be conformable to the laws of England, and to be continued in force until declared void by the crown or council in England.

§ 27. No legislative power whatever seems to have been delegated to the colonists themselves. In fact there was so great destitution of legislative authority as to lead the American historian to conclude, that "by placing the legislative and executive powers in a council nominated by the crown and

guided by its instruction, every person residing in America seemed to be bereaved of the noblest privilege of a freeman." He accounts for this from the fact, that in the infancy of colonization and without the guidance of observation or experience, the ideas of men, with respect to the mode of forming new settlements, were not fully unfolded or properly arranged. At this earlier period, it was impossible for them to foresee the future grandeur and importance of the communities which they were about to call into existence; and they were but illy qualified to concoct the best plans for their future government. The probabilities, however, are, that this withholding of a right to legislate from the colonists, originated in the spirit of the age, in the character of a monarch accustomed to claim the high prerogative of an arbitrary rule, and whose breast was not animated with a single liberal sentiment, in relation to the political rights of his subjects.(*a*)

§ 28. In 1610, Lord Delaware, under his commission being invested with the sole command of the colony of Virginia, appointed a council of six persons to assist him in the administration. A very essential change seems at this time to have taken place in the form of the ancient Virginia Constitution, for we find substituted in the place of the original aristocratic council in England, the arbitrary rule of one man, over whose deliberations the people had no control.

§ 29. In 1619, we find that the spirit of the colonies, as they increased in numbers, partook of a more independent character. Hitherto they had been subject to the decision of martial law, which however, in all probability, was tempered by all the mildness with which the

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(*a*) Robertson's History of America; Book 9, Vol. i. p. 403.

circumstances of the case would admit, nevertheless they longed for the opportunity of exercising the exalted privilege of prescribing rules for their own government. In compliance with the spirit which had then become prevalent among the colonies, in June, 1619, Sir George Yeardly called the first general assembly that was ever held in Virginia, which is the commencement of the history of the introduction of provincial legislatures. The numbers of the people, though small, had become so increased, their new settlements so dispersed, that eleven corporations appeared by their representatives in this convention, where they were permitted to assume legislative authority, and to exercise this noblest function of freemen. They sat in the same house with the governor and council, after the manner of the Scotch Parliament.(*a*)

The laws enacted in it seem neither to have been many, nor of great importance; but the meeting was highly acceptable to the people, as they beheld amongst themselves the foundations of a national constitution. In order to make these rights more certain, the company issued a charter of ordinance on the 24th of July, which gave a legal and permanent form to the government of the colony.(*b*) Thus was formed and established the first representative legislature that ever sat in America, and this example of a domestic parliament to regulate all the internal concerns of the country, was never lost sight of, but was ever afterwards cherished throughout America as the dearest birthright of freemen.(*c*)

§ 30. The supreme legislative authority in Virginia, in imitation of that in Great Britain, was divided, and

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(*a*) Holme's American Annals, Vol. i, pp. 169 to 195; Robertson's Amer., Book 9, Vol. i. p. 412.

(*b*) Robt. Amer., Book 9, p. 412.

(*c*) Story on Cons., Vol. i. book 1, p. 26.

lodged partly in the governor, who held the place of the sovereign; partly in a council of state named by the company, which possessed some of the distinctions and exercised some of the functions belonging to the peerage; partly in a general council or assembly, composed of the representatives of the people, in which were vested powers and privileges similar to those of the house of commons. In both those councils all questions were to be determined by the majority of voices, and a negative was reserved to the governor; but no law or ordinance, though approved by all the three members of the legislature, was to be of force until it was ratified in England by a general court of the company, and returned under its seal. The ordinance further required the general assembly, as also the council of state, "to imitate and follow the policy of the form of government, laws, customs, and manner of trial, and other administration of justice, used in the realms of England, as near as may be." Thus the constitution of the colony became fixed, and the members of it thenceforth, were considered not merely as servants of a commercial company, dependent on the will and order of their superiors, but as freemen and citizens.(*a*)

§ 31. In May, 1623, King James, without regard to the rights conveyed to the company by their charter, or without the formality of judicial proceedings, appointed certain commissioners, of whom Sir William Jones was one, to examine into the transactions of the company, and lay the result of their inquiry before him.(*b*) After their departure a quo warranto was issued from the King's Bench, which terminated, as was usual in that

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(*a*) Story on Cons., Vol. i. Book 1, ch. 2, p. 26; Robt. Am., Vol. i. Book 9, p. 413; Holme's Amer. Annals, Vol. i. pp. 214, 215.

(*b*) Robt. Amer., Vol. i. Book 9, p. 416.

reign, in a decision perfectly consonant to the wishes of the monarch. The charter was declared forfeited, and the company dissolved in June, 1624; and all the privileges conferred upon it reverted to the king.(*a*) James then issued a new commission for the government of Virginia, constituting Sir Francis Wyall governor, with eleven assistants, or counsellors. The governor and council were appointed during the pleasure of the king, and no assembly was mentioned or allowed.(*b*) James indeed purposed to provide and draw a form of government, but before it was done, death put an end to his career. Robertson conveys the impression, that on the accession of Charles I., March 27, 1625, he declared the colony as annexed to the crown, and immediately subordinate to its jurisdiction. Under the administration of Governor Yeardly, and a council of twelve and a secretary, was delegated to them the exercise of supreme authority, under an injunction from the king to conform in every point to such instructions as should, from time to time be received from him.(*c*) From the term of the king's commission, as well as from the known spirit of his policy, it seems manifest that it was his intention to invest every power of government, both legislative and executive, in the governor and council, without recourse to the representatives of the people. During a great part of this king's reign, the colonists knew no other law than the will of the sovereign. Statutes were published, and even taxes imposed, without once assembling the representatives of the people to authorize or sanction them.(*d*)

(*a*) Robt. Amer., Vol. i., Book 9, p. 417; Holme's Amer. Annals, Vol. i., p. 233.

(*b*) Holme's Annals, p. 234; Robt. America, p. 418.

(*c*) Robt. Am., 418. (*d*) Ibid.

§ 32. During the period that intervened between the appointment of Yeardly, and the appointment of Sir William Berkley in 1659, under Yeardly and the tyrannical and most odious Sir John Harvey, the colonists had not only to submit to the degradation of being deprived of the exercise of the dearest rights of the citizen, but they were subjected to the most cruel and tyrannical laws, by which not only the personal rights of the citizens were(*a*) disregarded, but private property was violently invaded. Robertson also asserts, that under governors appointed by the commonwealth, or Cromwell when he usurped the supreme power, Virginia remained almost nine years in perfect tranquility; that upon the death of Mathews, the last governor named by Cromwell, the sentiments and inclinations of the people, no longer under the control of authority, burst out with violence. They forced Sir William Berkley to quit his retirement; they unanimously elected him governor of the colony, and, as he refused to act under usurped authority, they boldly erected the royal standard, and acknowledged Charles II. to be their lawful sovereign. Mr. Hening, in his preface to the statutes at large of Virginia, thus refutes the assertion of this great historian. He says: "There is not one word of truth in any part of this relation. Not a single governor was appointed either by the *parliament* or by *Cromwell*. But they were elected by the HOUSE OF BURGESSES, in pursuance of the powers vested in them by the provisional articles of government adopted at the surrender of the country to the commissioners appointed in behalf of the parliament.

So far were the assembly from erecting the royal standard, and proclaiming Charles II. at the time when

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(*a*) Robertson's America, p. 418.

they elected Sir William Berkley governor, that by the very first act of the same session, they expressly took the powers of government into their own hands; and declared that all writs should issue in the name of the Grand Assembly.(*a*) By the second act, they appointed Sir William Berkley governor; enforced it on him to call an assembly once in two years at least, or oftener if necessary; gave him the power of making a secretary and counsellor of state, with the approbation of the assembly, and restrained him from dissolving the assembly, without the consent of the major part of the house. These acts passed at an assembly held in March, 1659-60, between the resignation of Richard Cromwell, (on 22d April, 1659,) and the restoration of Charles II., (on 29th May, 1660,) at a time when, as the assembly express themselves, '*There was no resident, absolute, and general confessed power in England.*'"(*b*)

Mr. Hening is certainly sustained in these views by the acts published in his edition of the statutes at large.

§ 33. It appears to be doubtful whether any assembly was held during the year 1620: one was held in 1621. From that period to 1629, the acts of the legislature of Virginia are scarcely noticed in the minutes of the company; the proclamation of the governor supplying, in almost every instance, the place of the legislative act. But from 1629, with but little intermission for a series of years, the acts of each session are accurately epitomacised.(*c*)

It has been supposed by many—even by historians of England and America—that during the administration of

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(*a*) See act of March, 1659-60, p. 550, 1st Vol. Statutes.

(*b*) Preface to Hening's Stat. at Large, Vol. i. pp. 13, 14.

(*c*) 1 Hen. Stat. at Large, p. 119.

Sir John Harvey, there was no attempt made to convene the colonial assembly. It is evident, however, that from 1630 to 1642, the Virginians did enjoy the benefits of an independent colonial legislature; and, that through the agency of their representatives, they levied and appropriated taxes, secured the free industry of their citizens, and gave to their statutes the greatest possible publicity; and that as early as 1632, the defects and inconveniences of an infant legislature were remedied by a revised code, which was published by the approbation of the governor and council, and in which all the privileges which the assembly had ever claimed, were carefully confirmed. Indeed, it seems they had never been questioned, for the instructions to Sir William Berkley do not first order assemblies, but speak of them as a thing established. At the first session of Berkley's legislature, the assembly declared its meeting as "exceeding customary limits in this place used." This is a plain declaration that assemblies were the custom and usage of Virginia, at the time of Berkley's arrival. By reference to the first volume of Hening's Statutes at large, it will appear most conclusive, that assemblies were convened for every year, except 1631, from 1630 to 1642, inclusive.(*a*)

From this period down to that of the revolution, the laws appear to have been enacted by the representatives of the people, subject to the final assent of the crown. The bill of rights was unanimously adopted on 12th June, 1776.

§ 34. The constitution of Virginia, adopted on the 29th of June, 1776, provided that the legislature should be formed of two distinct branches, who together should

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(*a*) Bancroft's History, vol. i. ch. 6, pp. 199, 200. 1 Hen. Stat. at Large, pp. 147, 257, 153, 177, 178 to 202, 209, 222, 223, 227, 229, 230, 268, 259, 262, 267, 230, 269, 171, 172, 175, 177, 179.

be a complete legislature. They were required to meet once in each year, or oftener, under the name of the general assembly of Virginia, composed of a house of delegates and the senate. The laws of Virginia were first revised in September, 1632, although not so named until March, 1642-3. In March, 1657-8, during the existence of the commonwealth, another revisal was made, adapting the laws of the colony to the state of the church and the republican institutions of that day. In March, 1661-2, after the restoration of Charles II., the laws were again revised; the object of this revision, as expressed in the preamble of the act was, to repeal and expunge all laws "which might keep in memory their forced deviation from their majesty's obedience."

The next revisal was in 1705. No laws were printed until the year 1733. The first edition, called Purvis's edition, was published in London without date, and only with the initials of the printer's name, as it was supposed between the years 1684 and 1687, from the fact that it was dedicated to Lord Howard, who was governor of Virginia during that period. In 1722 an abridgment of the laws of Virginia were also published in London, and a second edition of it in 1728. Purvis's edition seems to have been bound up with blank leaves for the reception of subsequent laws, and to have been distributed to the separate counties at different times. All these editions, except that of Purvis's collection, exist to this day. The principal revisals since Purvis's, are the editions of 1733, 1752, 1769, 1783, 1794, 1803, 1808, and 1819.

§ 35. By an act of the general assembly of Virginia, passed 28th December, 1792, it was ordained, that a collection should be made of all such acts of the assembly of a public and permanent nature as were then in force. This compilation was not completed until the close of the year 1794. Under the act of 5th Febru-

ary, 1808, the statutes at large of Virginia were published by Mr. Hening, comprising a collection of the laws of Virginia from the first session of the legislature in 1619.

Under an act of the 12th March, 1819, another revised code of the laws of Virginia was published, which contained a collection of all such acts of the general assembly of a public and permanent nature as were then in force, edited by Thomas Ritchie, aided by Messrs. Hening and Mumford. From that period to the present time, the laws of Virginia are published in separate volumes containing the statutes of each year.

CHAPTER IV.

§ 36. HAVING detailed some of the prominent facts connected with the history of the statutes of the colony and state of Virginia, we shall next direct our attention to the history of the statute laws of Massachusetts. The immediate causes which led to the first settlement of the colony of New Plymouth had their origin in one of those mysterious dispensations of divine economy not unfrequently misunderstood by short sighted men, but which form a part of that great consecutive plan, or link in the great chain of events, by which the righteous sovereign of the universe accomplishes his purposes in moulding the destinies of a nation. A small but truly Spartan band had, by their independence in religious sentiments, rendered themselves obnoxious to an arrogant ecclesiastical hierarchy, sanctioned by the civil polity of England. They, as offenders against the forms of religion, in the exemplification of its spirit and power, were forced into exile and banished from their native land, to the end that they might be schooled in adversity, for the sacrifice of kindred and country, to the demands of the great and glorious cause of truth, thus to be fitted and trained to the endurance of those privations, toils and hardships necessarily to be encountered in the early settlement of a new country; here to lay the foundations broad and deep of one of the greatest republics ever known in the world's history; here to plant those great civil and political institutions which now so justly claim the admiration and respect of the whole civilized world.

The history of colonial legislation in Massachusetts is divided into three parts, each of which demand and will receive a separate consideration. The one, embracing

that of the colony of Plymouth from its earliest settlement down to the period of its union with that of Massachusetts Bay in 1691. The second, that of the colony of Massachusetts Bay from the period of its settlement to the time of its union with Plymouth. The third, from the union of the two colonies to the Revolution. We shall first proceed to that of New Plymouth. For all that we shall collate upon this branch of our subject, it is proper that we premise with an acknowledgment that we are exclusively indebted to the learned and laborious as well as accurate researches of William Brigham, Esq., in an article from his pen in a number of the North American Review, from which all that we shall say is derived, and much of it couched in his own succinct and beautiful language.

§ 37. The history of this colony extends through a period of seventy-one years, from 1620 to 1691, when it was united to Massachusetts, becoming a part of the province of Massachusetts Bay. Its territory, comprising most of the present counties of Plymouth, Barnstable, and Bristol, together with a small tract of land now included within the limits of Rhode Island, being about one seventh part of the present commonwealth of Massachusetts. It was divided into three counties and twenty townships and districts, and in 1691 it contained a population of about 9000, now including upwards of fifty townships and 140,000 inhabitants. As early as 1602 a number of persons in England, feeling themselves aggrieved, began to converse upon the subject of removing from that country, but took no measures for that purpose until 1602, when a small number of puritans settled at Leyden in Holland, where they remained until July, 1620. Their first permanent settlement at Plymouth was on the 22d December in that year.

§ 38. On their arrival they found themselves without government,—without any constituted authority by

which the members of their community could be restrained and its affairs managed. They acknowledged themselves subjects of the King of England and knew they were within his dominions. Yet they were too insignificant and too remote to feel or fear his authority or to expect any protection. No people had so fully appreciated the value of the rights of each member of the state, none had felt so deeply the great cause of humanity, or entertained such cheering hopes of human improvement. Yet such is the constitution of the human mind and the nature of human attachment to the institutions of ancestors, and the early associations of childhood, that it was difficult for them at once to break loose from the ties that bound them to their native land, or to model a form of government in all respects unlike that under which they had lived and suffered. No one can doubt that the form and constitution of the government of England was entirely unsuited to the condition of an infant colony, and that the circumstances and condition of the colonists demanded such a modification of their institutions, as in many important features to change the very nature and character of their political compact.

They had fled from a government which they believed tyrannical, and it was not strange that they should have used every precaution to resist in their new situation the evils from which they had escaped. In their new situation they were free from all political restraints, and could make in the establishment of their government and institutions a practical recognition of those political principles upon which they believed the well being and happiness of society rested. In this respect they had the advantage over most of the other American colonies, for which governments were formed previous to their settlement by means of charters from the king.

§ 39. The government of this colony dates its origin from November 11th, 1620, when the Plymouth fathers

met in a convention, in the cabin of the Mayflower, for the purpose of forming a social compact. In which they declared themselves the loyal subjects of King James, and that their undertaking was for the advancement of the Christian faith, and the honor of the king and country. They then enacted that "they solemnly and mutually, in presence of God and one another, consort and combine into a civil body politic, for their better ordering and preservation, and furtherance of the ends aforesaid; and by virtue thereof do enact, institute and frame, such equal laws, ordinances, acts, constitutions and offices, from time to time, as shall be thought most convenient for the general good of the colony." To this compact they all promised submission and obedience, thereby investing a majority with the whole political power, and recognizing to the fullest extent the right of such a majority to govern. Unlike the Constitution of the United and the several States, it made no division of political powers, contained no checks, imposed no restraints on the government, but left the whole to the rule and decision of a bare majority.

During the whole existence of the colony this form of polity was continued; and though at subsequent periods, there was some division of political power, and some restrictions were imposed upon the government, yet this was all done by mere acts of legislation which could, at any moment, be annulled by legislative power. This compact may properly be considered the only valid constitution which the colony ever had, and to it they clung with the greatest tenacity.

§ 40. On the 3d of November, the king granted to the Council of Plymouth the territory of New Plymouth, with other lands. This rendered it necessary, to avoid difficulties, for the colonists to acquire that right, which was done in 1629 by a charter from the Council of Plymouth to William Bradford and his associates. This

charter was no more a charter of government than the hundred conveyances from the natives, and so the colonists considered it, for they spared no efforts to obtain the sanction of the king to it, being aware that without this they had no assurance that he would do them the favor to let them alone. Their efforts were however unavailing. The king never gave his sanction, and from the beginning of the colony to the end, its government can properly be considered as resting on no other basis than the will of the colonists themselves. For this reason, we see that in every period of their history they exhibited a constant solicitude, not only as to the validity of their government, but as to the extent of those powers which they might exercise under it.

§ 41. For the first sixteen years we have but a meagre account of the legislation of the colony. There are no records of the Plymouth Colony Laws till 1623; and the first act established the trial by jury. From that time a record was kept. Anterior to the records of the colony, the population being exceedingly small, notwithstanding the community required many municipal regulations, the necessity for a record was in a great measure obviated, from the fact that such regulations and laws were adopted in general assembly of the people. Their existence was thus made known to all; and as many of them partook rather of the nature of temporary rules than permanent laws, there was the less necessity for keeping records thereof. These laws were made at first by the whole people in general assembly, but afterwards by the governor, assistants, and representatives, subject to the approval of the people in certain cases, and then it was that records became the more necessary.

§ 42. In 1636, a new era occurred in its legislation. The circumstances as well as the number of the colonists had so changed, it was found that their then system was unsuited to their condition. They now found

it necessary to create new offices, define their powers, establish fixed laws, and define more fully the authority under which they acted. For this purpose, a general court was called in October of that year, and a committee of fourteen appointed to revise the laws. Their report was made, and a new code adopted within five weeks, which constituted the first revision of their laws; and one copy in manuscript was made, and preserved by the secretary. This code first gave form to the government of the colony, and invested it with its most distinguished features. Its preamble recites the authority of the colonists to make laws, and declares, that as free born subjects of England, they were possessed of all the rights of Englishmen; and that as such, no law, imposition or ordinance, should be made or imposed upon them, but by their consent; the very doctrine maintained by their descendants a century and a half afterwards in the Declaration of American Independence. It further provided, that an election should be held on the first Tuesday of March annually, at which all their officers should be chosen, viz: A Governor, seven Assistants, a Clerk, Treasurer, Coroner, Messenger, and Constables. The duties and powers of those officers were, to a considerable extent, defined. The governor had authority to summon and dissolve the general court, and was made a conservator of the public peace; but in other respects he had little more authority than any of the other magistrates, except that he could cast a double vote in the general court. The assistants composed his council; and both together were invested with extensive judicial powers. The messenger was the chief executive officer of the general court, and performed duties very similar to those of a sheriff at the present day.

§ 43. Until 1639 all the freemen in general court took part in enacting laws, and this was not merely a privilege but a duty enjoined under a penalty of ten shillings

sterling. This system was thus continued; but at this period the population had become so numerous and scattered and it had become so burdensome that it was abandoned. In September, 1638, the general court enacted that each town in the colony, except Plymouth, should choose two persons, and Plymouth four, who with the governor and assistants, should make all good and wholesome laws, as would be for the benefit of the colony, provided that all the laws so made should be proposed at one general court and remain to be considered at the next. This provision was doubtless made with a view to afford an opportunity to the representatives of the people to consult their constituents in reference to the propriety and expediency of the adoption of any proposed enactment. It was also further provided, that if any law so enacted should be found prejudicial, all the freemen assembled at the court of election might repeal it. This was the beginning of the representative system of the colony, and from this time until its union with Massachusetts Bay most of the laws were made by the governor, assistants, and deputies, composing a single body; though at all times the freemen claimed, and not unfrequently exercised, the right of assembling and enacting laws for themselves. The election of deputies was regarded as a matter of convenience, and not as precluding them from the rights of legislating for themselves. In all cases of great importance, where the representatives did not wish to take the responsibility, the freemen were called together, or their wishes were otherwise ascertained. The representatives were strictly the servants of the people, and their whole power could be taken from them, even while they remained in office.

In 1646 a law was made fixing the time of the meeting of the general court. By this law that body was required to meet in the summer at seven o'clock, in the

winter at eight o'clock; and to remain in session till half past eleven, when an adjournment took place for dinner. After dinner they were required to hold another session, to such an hour in the evening as the governor thought proper. And, in order to insure punctuality and constant attendance, each member was liable to a fine of a sixpence for tardiness, and also for each hour's absence during the session, thus setting an example of devotion to their duties, worthy of, but little imitated by modern legislators.

§ 44. Anterior to 1658 no measures were adopted for the publication of the laws. They were kept by the secretary, who had but a single copy, and who kept them not in a volume by themselves, but in connection with all other records he was required to make. In the same manuscript volume are found the general laws, judicial proceedings of the court of assistants, the record of deeds, wills, marriages, deaths, coroners' inquests, and accounts of special providences. Thus they had grown so voluminous as to render it necessary to adopt some measure for the ascertainment of those laws then in force. The process of repealing and amending laws was to erase or expunge. Many of the laws had been thus repealed or amended without any evidence upon the face of the records as to the time when done. At a general court held in 1656, a committee was appointed to "peruse the laws and reduce them to order." They made a selection from the whole body of the laws, suggested such amendments as they thought proper, and arranged them in alphabetical order in one manuscript volume. This volume was then submitted to the general court and formally enacted. The general court in an address to the people explanatory of these laws, remark, "We have had an eye primarily and principally upon the Jewish platform, and unto the right improvement of the liberties granted unto us by our superiors the states

of England at the first beginning of this infant plantation, which was to enact such laws as should most befit a state in the non-age thereof, not rejecting or omitting to observe such of the laws of our native country as would conduce unto the good and growth of so weak a beginning as ours in the wilderness."

The secretary was directed to and did prepare a manuscript volume of these laws for each of the towns in the colony, in whose meetings they were to be read at least once in a year. It is believed that some copies of these laws are still extant. There was one in the town of Taunton in a good state of preservation, but which was destroyed by a great fire which occurred in that town, some years since.

§ 45. In 1671, another revision was made by a convention of the general court. It was not like the others, a mere publication of the laws then in existence, but a complete digest properly arranged. This was printe d and is the first edition of the laws of the colony which was printed. In 1684, another digest was made under the direction of a committee of the general court, and printed. No other edition of the laws of this colony was printed till 1836, when they were again printed by an order of the legislature of Massachusetts, under the superintendence of William Brigham, Esq.; to whose kindness and research, as already remarked, we are indebted for all the information possessed relative to the facts above detailed, in reference to the legislative history of this colony.

Any one desirous of more extensive information upon this subject, will peruse with great pleasure as well as profit, the learned article from the pen of Mr. Brigham, in the April number of the North American Review for 1840; from which we have in part made our extracts —and in part from a letter he had the kindness to write

the author, in answer to one addressed to him for information on this subject.

§ 46. We shall, in the next place, direct our attention to the colony of Massachusetts Bay. For a period after the arrival of the colonists, they seem to have been actuated by the spirit of that religion which they professed, and in defence of which they too had suffered. It formed the only restraint under which they lived. The pure and elevated precepts which it inculcated, was the only rule of civil government which was known or brought into exercise in the government of the colony of Massachusetts Bay. For a time at least, it seemed entirely adequate to all the great ends of their limited social compact. As the colony increased, it soon became apparent that something more was needed to strengthen the arm of civil authority, for the government of a growing republic destined, as it was from its position, to become a great commercial community, and the inlet to a continent intrinsically inexhaustible in its resources.

§ 47. The first settlers in this colony had taken possession under no other grant, except one which was derived from a mere private corporation; and which necessarily could not, and did not confer any right to the exercise of civil or political authority. Hence, it became necessary and important to have their right of property rest upon a more sure foundation, and that it should flow to them from a source which could at the same time, confer the right of exercising some of the attributes of sovereignty itself in founding their civil institutions. In 1629, on the petition of the Massachusetts Company, seconded by the solicitations of Lord Dorchester, Charles I. by charter confirmed the patent of the Massachusetts colony. By this patent the company were incorporated by the name of "The Governor and Company of the Massachusetts Bay in New Eng-

land," to have perpetual succession forever: and it was empowered to elect out of the freemen of the said company, a Governor, a Deputy Governor, and eighteen Assistants, to be chosen annually; and to make laws not repugnant to the laws of England.(*a*)

§ 48. By the terms of the charter, full legislative power and executive authority was conferred not on the emigrants, but on the company, of which, from the very fact of its location in England, the emigrants could not be active members. The associates in London were to establish ordinances, to settle the form of government, to name all necessary officers, to prescribe their duties, and to establish their criminal code. Thus it will be perceived Massachusetts was not originally erected into a province to be governed by laws of its own enactment. It was reserved for the corporation to decide what degrees of civil rights its colonists should enjoy; indeed, the charter on which the freemen of Massachusetts succeeded in erecting a system of independent representative liberty did not secure to them a single privilege of self government. They, like the Virginians, had been left without one valuable franchise, entirely at the mercy of a corporation without the colony, insomuch that they too understood that a strict adherence to its letter would reduce them to absolute slaves.(*b*) Nay more, even the legislative power granted to the company itself, was subject to the restriction of not being contrary to the laws of England; and its imposition of fines and mulcts were to be "according to the course of other corporations in England."(*c*) To surmount and rise

(*a*) 1 Holmes' An. 247-8; Hutch. Col. 123; 1 Chalm. An. 137; 1 Bancroft, 344, 345.

(*b*) 1 Bancroft, 344, 345.

(*c*) Hutch. Col. 1 to 23, 239; Chalm. An. 139.

above such obstacles as these, it required men just like those whose minds had been animated with a spirit of religious independence, and which hesitated not to exemplify a spirit of innovation in civil as well as religious policy.

The habits of mind they had acquired in casting off the restraints of outward and senseless forms and external rights in the one, fitted them to the work, and paved the way for a kindred spirit of innovation in prosecution of their natural and inherent civil rights as freemen.

§ 49. Shortly after the consummation of the charter, a court of the Massachusetts company was held in London which settled a form of government for the new colony. It ordained that eighteen persons, such as should be reputed the most wise, honest, expert, and discreet, resident in the colonial plantations, should from time to time have the sole management of the government and affairs of the colony; and they, to the best of their judgment, were to endeavor to settle the same as might "make most to the glory of God, the furtherance and advancement of this hopeful plantation, the encouragement and future benefit of the company, and of others, concerned in the commencement and prosecution of the work." The persons thus appointed to be entitled, "The Governor and Council of London's Plantation in Massachusetts Bay in New England." On the 29th of August, 1629, for the purpose of promoting the determination of certain individuals of becoming members of the colony, and whose sagacity led them to foresee the inconvenience of being governed by laws made for them without their consent, and whose judgment led them to the rational conclusion that the colony should be governed by men resident among them, rather than by those living three thousand miles distant, with an intervening ocean, and over whom they could have no control; the governor and company called a general court for the purpose of settling the

question, whether the government should be settled in Old or New England; and it was then determined, that the government and patent of the plantation should be transferred from London to Massachusetts Bay: and an election was called for the purpose of electing such officers as should be willing to remove to the colony. John Winthrop was thereupon elected governor, and a deputy and assistant were also elected.(*a*.) In this singular transaction, to which there is no parallel in the history of the English colonies, two circumstances merit particular attention: one is the power of the company to make the transferance; the other is, the silent acquiescence with which the king permitted it to take place. That acquiescence, however, is most satisfactorily accounted for in the history of the subsequent struggle between the crown and the colony, down to the final overthrow of the charter in 1684. If the validity of this determination of the company be tried by the charter which constituted it a body politic, and conveyed to it all the corporate powers with which it was invested, it is evident that it could neither exercise those powers in any mode different from what the charter prescribed, nor alienate them in such a manner as to convert the jurisdiction of a trading corporation in England into a provincial government in America! It is quite evident that, on the one hand, the king never intended this charter to operate as a concession of any of his rights, or to yield under it any of his prerogatives to the colonists; and that, on the other hand, the patentees, from the first institution of the company, did intend the moment they had taken possession under it, to assume that they not only possessed the natural right, but that they would exercise that right, in the adoption of such form of government, and to enact

(*a*) Holmes' An. vol. i. pp. 247, 248.

such laws as they might deem conducive to the general welfare, and the growth and progress of civil, political, and religious liberty in the land of their adoption.(*a*)

§ 50. The government of the colony, immediately after the renewal of the charter, was changed in many of its most important features, but its fundamental grant of territory, power, and privileges, were always maintained. They never ceased to recognize its obligatory force, yet they at the same time, did assume to exercise political powers beyond the express words of the grant. They adhered to the charter as a shield against the demands and prerogatives of royal authority; but claimed that it did not set any limits to the natural inherent right of freemen to exercise legislative, executive, or judicial authority. They did not view it as creating an English corporation under the narrow construction of the common law, but as affording the means of founding a broad political government, subject to the crown of England, yet enjoying many exclusive privileges.(*b*)

§ 51. The first court of assistants was held at Charlestown on the 23d day of August, 1630, on board the ship Arabella; at which time the power of the administration was considered, to the end that the liberties of the people might be secured against the encroachments of their rulers. The records of their proceedings show that these colonists were men of great political sagacity as well as religious zeal; that they were not only well versed in the science of politics, but that they also understood not only the ethics of natural right and civil liberty, but also had learned the corrupting influence which the exercise of civil power exerts over the hearts of men; for says

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(*a*) Robt. Am. 436-7; 1 Story on Const. 50.

(*b*) 1 Hutch. His. 25, 36, 37, 410, 507, 529; 3 Hutch. Col. 199, 200, 203, 205, 207, 196, 329, 330; 1 Story on Const. 51.

one, "*The waves of the sea do not more certainly wash the shore, than the minds of ambitious men are led to invade the liberties of their brethren.*"(*a*) The frame of the government in the old colony, was of the utmost simplicity. A governor was chosen by general suffrage, whose powers were subordinate to the general will. For more than eighteen years, the whole body of the male inhabitants constituted the legislature. The state was governed like a strict democracy, and the people were frequently led to decide on executive, not less than on judicial questions. This, however, on the increase of population, and the extension of the colony, led to the introduction of the representative system; and each town sent its representative to the general court.

§ 52. By the terms of the charter, the fundamental laws were to be enacted in the assembly of all the freemen of the colony. For this purpose, the first general court of the colony was held at Boston, on the 19th day of October, 1630, at which many of the first planters attended, and were made free of the colony. The very first act of this assembly was to establish an elective aristocracy, for it was then enacted, that the freemen should in future have power to choose assistants whenever they were chosen; and the assistants were empowered to choose of their number, the governor and deputy governor, who, with the assistants, were to make all laws, and to appoint officers for the execution of them. But the aristocratic spirit of this resolution was soon detected, and as it did not accord with the ideas of equality then prevalent among the people, it did not meet with their approbation; and the very next year, the freemen, whose numbers in the mean time had been greatly increased, resumed their former rights, and or-

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(*a*) 1 Holmes' Annals, 255; 1 Ban. 359.

dained that the governor, deputy governor and assistants, should thereafter be chosen by the freemen alone. It was also ordained that, for time to come, no man should be admitted to the freedom of the body politic but such as was a member of some of the churches within the limits of the same.(*a*) This latter ordinance has elicited the most bitter invective of English, and the most cutting sarcasm from the pen of American historians.

§ 53. In the year 1635, they drew a general declaration that the general court alone had the power to make and establish laws, to elect officers, to raise money by taxes, and to sell lands; and that every town might choose representatives, not exceeding two, who should have full power and the voice of the freemen, except in the choice of certain officers and magistrates, wherein every freeman should give his vote. Thus was established the second house of representatives in any of the American colonies.

The colonists were induced to this important step by the fact that their numbers had so increased, their population so spread, that many of the freemen were too far distant from the place where the general court was held to admit of their personal attendance without great inconvenience. The form of government in their native country had rendered them familiar with a delegation of rights, of committing the guardianship of their liberties to representatives of their own choice; and the experience of ages had taught them, that this sacred trust must of necessity be lodged somewhere, and that it could not with greater safety be delegated to other hands than the immediate representatives of the people.(*b*)

§ 54. In 1641 the general court established one hun-

(*a*) Robt. Am. 437; 1 Holmes' Ann. 262; 1 Ban. 360.
(*b*) 1 Holmes' Ann. 287; Robt. Am. 438.

dred laws, called the "body of liberties," which strongly delineated the character of the people, the principles and policy by which they were to be governed; in which it was, among other things, ordained that there should be no monopolies, only of such new inventions as were profitable to the country, and those for a short time only. Up to 1644 the entire legislative body sat in the same room and deliberated together. A change then took place in the government, by which the two houses were divided, and from this time the two houses sat apart; the one composed of the magistrates, and the other of the delegates; whatever was passed by one was, thereafter, sent to the other, and if both agreed to it, the act was considered as passed.

This course of legislative proceeding continued until the final dissolution of the charter.(*a*) The colonial legislature in this colony, with the restrictions necessarily arising from their dependence on Great Britain, were sovereign within the limits of their colony; all laws, however, were required to receive the royal assent in England, and the king possessed the power of abrogating them, and they were never deemed final until they had passed under his review. In respect to the mode of enacting laws, the council were chosen by the legislature, and the governor had a negative on their choice.(*b*)

§ 55. It appears, that as early as 1634 a consultation had been had respecting a body of laws adapted to the civil and religious state of Massachusetts, and that from that period to 1648, a committee consisting of magistrates and elders had been appointed almost every year to prepare such a code for the colony. Meanwhile laws of the greatest necessity had been successfully enacted. In the latter year the whole of these statutes for the first time

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(*a*) Holmes' An. 331.

(*b*) Story on Const. vol. i. p. 158, 159.

were collected together, received the ratification of the general court, and were ordered to be published.(*a*) This was the first revision of this colony's laws. Mr. Brigham, in the letter addressed to me, heretofore alluded to, says, "Although the general court in ordering this revision to be made, also ordered it to be printed. I have not however ever been able to ascertain that it was ever printed."

§ 56. In 1683 a *quo warranto* was issued against the corporation of Massachusetts Bay. It was insisted that the colonists had conformed so little to the terms of their charter that they had forfeited their franchises; and on the 18th day of June their charter was conditionally adjudged to be forfeited, and the judgment was confirmed on the first day of the then next Michaelmas term of the court.(*b*)

After the judgment of forfeiture, when all the rights of the corporation were deemed as restored to the crown, Charles began to take measures for remodeling the political frame of the colony, and vesting the offices of it in other hands, but this plan was never carried into execution, as in every corner of his own dominions the storm began to gather, which soon after burst out with such fatal violence, so that during the remainder of his unfortunate reign he was too much occupied with domestic and more interesting cares and perplexities to bestow any attention upon this remote and inconsiderable province. In the mean time the colony remained for some years in a very disturbed state, under the arbitrary power of the crown.(*c*)

§ 57. Whatever opinions might have been entertained that the subjection of the colony depended on compact

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(*a*) 1 Holmes' An. 344, 345.

(*b*) 1 Holmes' An. 460. 2 Ban. 127.

(*c*) 1 Holmes' An. 460, 475. 2. Ban. 127. 1 Rob. Am. 44. 1 Story on Const. 54.

between it and the crown. They certainly were compelled to submit to superior power, and to such form of government as Charles II. and his successor James saw fit to establish until 1689, when William and Mary were proclaimed successors to the throne of England. On the arrival of the Prince of Orange they resumed their charter, and strove hard to secure the establishment of it, but without success, until 1691. This era in the history of the colony brings us to the third period in its legislative history. In the latter year a new charter was obtained, which was received at Boston on the 14th day of May, 1692. The province now embraced within this new charter the whole of the old colony, to which was added New Plymouth, the provinces of Maine and Nova Scotia, and all the country between Maine and Nova Scotia, which necessarily led to the union of the two colonies of Massachusetts Bay and New Plymouth. Under the new charter there was to be an annual meeting of the general court on a day therein designated, with authority to the governor to call an assembly at any time he thought proper, and to adjourn, prorogue, and dissolve at pleasure. He had no vote in the legislature, nor ought he to interest himself in matters of debate in either house; but no act of government was valid without his assent. He appointed all military and judicial officers, with consent of the council; all other civil officers were elected by the two houses, the governor having a negative vote. Twenty-eight councillors were annually chosen by the general court or assembly. Mr. Justice Story says, "The first charter of Massachusetts might be open to the objection that it provided only for a civil corporation within the realm, and did not justify the assumption of extensive executive, legislative, and judicial powers which were afterwards exercised upon the removal of that charter to America; and a similar objection might be urged against the Plymouth colony. But the charter of Wil-

liam and Mary of 1691, was obviously upon a broader foundation, and was, in the strictest sense, a charter for general political government, a constitution for a state with sovereign powers and prerogatives, and not for a mere municipality. By this last charter the organization of the different departments of the government was in some respects similar to that in the provincial governments. By the statute 7 and 8 Wm. III., chap. 22, § 6, it was required that all governors appointed in charter and proprietary governments, should be approved by the crown before entering upon the duties of their office; but this statute was, if at all, ill observed, and seems to have produced no essential change in the colonial policy." 1 Story on Const. 146, 147.

§ 58. After the vacating of the colony laws under the old charter by the publication of the new charter, there was room to question what was the rule of law in civil and criminal cases, and how far the common law and what statutes were in force. The council appointed by the charter were to continue until May, 1693, and hence no provision was made for a general assembly in May, 1692. But writs issued immediately on the governor's arrival, and the court met on the 8th day of June in 1692, and an act passed declaring that all laws of the colony of Massachusetts and the colony of New Plymouth not inconsistent with the charter should be in force in the respective colonies to the 10th of November, 1692, except where other provisions should be made by act of assembly; and all justices of the peace, (assistants, like aldermen of London, were *ex officio* justices under the old charter,) had the same powers given to them in the execution of laws which magistrates used to have.(*a*) It was proposed that the members of the general court

(*a*) Hutch. Hist. Mass. vol. ii. pp. 20, 21, 22.

should during the recess consider of such laws as were necessary to be established; for the act reviving the colony laws as has been seen, was to continue in force no longer than until the tenth day of November, 1692.

This was a work of great importance, and required the wisest heads and the purest hearts, and should have been committed to select persons, and devised under a preconcerted plan, the whole of which each person should have kept in view. But such was not the fact, and as is usually the case, the want of this wise foresight has caused the people of the province to experience many inconveniences, for the construction of many laws have been doubtful and varying, it being impossible to reconcile the several parts of their colonial code with each other, or with any general principles of law whatever; besides being framed one after another as they happened to be brought in, and sent to England for allowance. Some were disapproved; others, which depended upon, or had some connection with those which were disapproved, were allowed; whereas if one complete code or system had been prepared and sent to England, such alterations would have been proposed as might finally have issued in a well digested and consistent body of laws; and a temporary provision might have been made until a well digested perpetual rule should have been devised and settled.

§ 59. Seven years had passed, and four different acts had been sent, one after another, to England, for establishing courts of justice, before the royal approbation could be obtained. It seems to have been the practice of the administration there (and that practice well enough received in the province) to point out, either in the order disallowing laws, or to the agent who presented them, the particular exceptions, and to propose such alterations as might render them acceptable, except in those cases where the law in all its parts was disapproved.

From the fact that the legislature, under the old charters, was composed of the same men who held seats under the new one, we find the same spirit pervading the new laws which characterized the old. So striking was the similarity in some instances, the same mind must have indited the old as well as the new ones, or the latter was chiefly a transcript from the former. The first act was a sort of magna charta, asserting and setting forth their general privileges, and this clause was among the rest: "No aid tax, tallage, assessment, custom, loan, benevolence, or imposition whatever shall be laid, assessed, imposed, or levied, on any of their majestie's subjects, or their estates, on any pretence whatsoever, but by the act and consent of the governor, council and representatives of the people assembled in general court."

The other parts of the act were copied from magna charta. This was soon disallowed: so was an act punishing capital offenders, amongst whom are ranked idolaters, blasphemers, and incestuous persons; and what the benignity of the common law makes manslaughter, was by this act expressly declared to be wilful murder. This law was framed from the judicial law of Moses. Divers other acts which discovered the same spirit, met with a similar fate. The danger they had been in from Sir Edward Andros calling their title in question, it is supposed, must have occasioned an act for quieting possession, declaring that three years' quiet possession should give a title, with a usual saving clause as to infants, &c. This was probably thought too short a time, and it was disallowed, as was an act for the equal distribution of insolvent estates. The rule of law for paying debts according to their nature and degree was thought preferable, but the people having never been used to this, it would have been very inconvenient; and, upon further trial, the act, or one to the same purpose, was allowed.

It was indeed difficult to assign a sufficient reason why not only one set of creditors of a deceased insolvent should be paid their full debts, to the exclusion of all others. Not even an executor or administrator had it in his power to pay himself, to the exclusion of others whose debts were of the same nature.

§ 60. Other acts were passed and approved, among which was one for preventing of frauds and perjuries, conformable to the statutes of Charles II. Others for punishing criminal offences, in many points mitigating the penalties at common law: for the observation of the *Lord's day;* solemnizing marriages by a minister, or a justice of the peace; settlement and support of ministers and schoolmasters; regulating towns and counties; requiring the oaths appointed, instead of the oaths of allegiance and supremacy; also the oaths of officers; establishing fees; ascertaining the number and regulating the house of representatives; as well as divers other acts of immediate necessity and general utility, which have been in force ever since, except as partially modified, but none of more universal influence than the act for the settlement of the estates of persons dying intestate. In a new country the length of time an estate has been in a family, cannot be urged for the further continuance of it; where improvements in the social condition of society are continually making, the personal estate is continually changing into real, which increases the natural injustice of one child taking the real estate of the parent to the exclusion of the other children: it was, therefore, thought reasonable that the real as well as personal estate of a parent should be equally distributed among his or her children, saving to the eldest son, either from the rules in the law of Moses, or the supposed just claim from primogeniture, a double share. The act was therefore, in general planned upon the statutes of distribution, but gave two shares to the eldest son, and undoubtedly,

in the distribution among the children of an intestate, respected real estate in like manner with personal. The widow had her third in the real estate for life only. It is evident that the principal point in view was to make real estate partible among the children of an intestate; and that they never considered the full operation of the clause in the statute, and which was also brought into the act, that where there were no children the whole estate should go to the next of kin of the intestate. Accordingly, for more than thirty years after the framing of this law, it was a prevailing practice, though perhaps not universal, for real estate to descend and be distributed by the court of probate as at common law, the instances of children of intestates only excepted. At length, by judgment of common law, first the half-blood, then the father and the mother have been determined to be entitled to the real, in like manner with the personal estate. General entails were adjudged, notwithstanding, to be partible. It has been supposed that upon this principle, that by this act the common law was altered only in respect to intestate estates, and takes place in devises as if it had not been made. It was indeed, in express terms declared in the law of the Plymouth colony, that lands in fee simple should go to all the sons, the eldest a double share, but that entails should go according to the laws of England.(*a*)

§ 61. In 1672, a new digest of the laws was made and printed. There was no other edition published after the union. In 1814, the colonial and provisional laws were both published by order of the legislature, under the supervision of Ashael Stearns and Lemuel Shaw. No edition of this law has been published since. Under the province there were numerous editions of the laws

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(*a*) 2 Hutch. His. 63, 64, 65, 66.

published, but the names of the editors do not appear in them. They were all published by order of the general court, as follows:

In 1703, all the laws from June, 1692, to May, 1703.

In 1726, a new edition, containing all the laws from 1792 to that time.

In 1750, another edition was published containing all the laws to May, 1750.

In 1755, another edition containing all previous laws to May of that year.

In 1765, there was an edition of temporary acts and laws from 1736 to 1765.

Mr. Brigham says there may have been some other editions of the province laws published, but he has been unable to find any until the one in 1814, before mentioned, which is the last. Under the State Constitution, there have been published the following editions of the state laws, viz:

In 1788, all laws from the adoption of the constitution in 1780 to May session, 1788.

In 1796, laws from 1789 to 1796.

In 1801, laws from 1780 to 1801.

In 1816, laws from 1780 to 1816, in four vols.

In 1823, the general laws from 1780 to 1822, under the supervision of Ashael Stearns, Lemuel Shaw and T. Metcalf, Esqrs., in two volumes. Also, the special laws for the same period in five volumes.

In 1836, the Revised Statutes were published under the supervision of T. Metcalf and Horace Mann, Esqrs. In 1837, the special laws from 1822 to 1837, were published under the supervision of Samuel B. Walcott, Esq. These, it is believed, are all the editions of the state laws which have been published, except such as have been printed annually by the legislature.

CHAPTER V.

§ 62. CONNECTICUT was originally founded under two distinct and independent colonial governments. The seat of government of the one was at Hartford, and that of the other at New Haven. They remained as independent governments until they were united under the charter of Charles II. of 1662. The union was not consummated until 1665. The colonists, who emigrated from England, brought with them a knowledge of the law and jurisprudence of that country. It cannot be said that they were necessarily subject to them, as those laws had no extra territorial authority, hence could not bind their persons; nor were they at all adapted to their new condition in their new circumstances; nor was it possible they should be, for it has been justly said that "The principles of their government, as it respected the prerogatives of the crown, the estate, rights, and powers of the lords, and the tenure of their lands, were derived from the feudal system. The privilege of sending members of parliament from the towns, cities and boroughs, to compose one branch of the legislature, and an exemption from taxation only by their consent, was extorted from the kings by the barons, and is confirmed by the great charter of liberties as of his gift and grant. Their other laws were calculated for a great commercial nation. As to their criminal code, it was adapted to a people grown old in the habits of vice—where the grossest enormities and crimes were practiced. In every respect, therefore, their laws were unsuited to an infant colony or state, where the government was in the people, and which had virtue for its principle, and the

public good for its object and end—where the tenure of their lands was free and absolute, the objects of trade few, and the commission of crimes rare. Thus circumstanced, they very early established a constitution and government by their own authority, which was adapted to their situation, and enacted laws for the due and regular administration of justice.(*a*)

The colonial history of Connecticut is divided into three subdivisions. The first, embracing the history of the Connecticut colony from its first settlement in 1636, down to the period of the union of the New Haven and Connecticut colonies. The second, comprising the history of the colony of New Haven from 1637 to the same period. The third, the history of the two colonies united, from the union in 1665 to the period of the American Revolution.

§ 63. The emigrants to the colony of Connecticut under the guidance and direction of Pynchean and Haines, pitched their tents on the western banks of the river Connecticut, near Hartford, in 1636; having first obtained permission of the general court of Massachusetts. It is difficult to discover what was the object of this permission, unless it was under the assumption that the citizen did not possess the right of expatriation from the colony to which he had attached himself without its consent; for the preamble to the commission itself acknowledged that the lands which they intended to take possession of, were without the commonwealth and body of Massachusetts, and that certain noblemen in England claimed jurisdiction there; and, because their minds were unknown, and there was a necessity of some government there, without the least pretence of authority to do so, they appointed Roger Ludlow, Esq., and

(*a*) Robertson's Am. 3, 4.

others therein named, with full power and authority to hear and determine, in a judicial way, all matters in difference between party and party, to inflict corporal punishment, imprisonment and fines, and to make orders and decrees for the present, as should be necessary for the plantation relating to trading, planting, building, military discipline, or defensive war, if need required, and to convene the inhabitants in a general court: the commission to terminate in one year, and might be recalled if a form of government should sooner be agreed on between the said nobles, the inhabitants, and Massachusetts.(*a*)

Hutchinson supposes that there is no accounting for this stretch of power, except upon the principle, at that time generally received, and which was afterward declared by the general court, *That the oath of fidelity to the commonwealth was binding even though the person should no longer reside within the limits.*(*b*)

§ 64. In 1636, the inhabitants of this colony, then resident in the three towns of Windsor, Hartford and Wethersfield, entered into a voluntary association, chose magistrates, made laws for themselves, and convened the first general court of the colony on the 6th day of April of that year.

The territory comprised within its limits in 1630 had been granted by the council of Plymouth to Robert, the Earl of Warwick, which was subsequently confirmed by a patent from Charles I.(*c*)

In 1631, the Earl of Warwick, President of the Council of Plymouth, granted unto the Hon. William Viscount Say and Seal, and to others, their heirs, assignees and associates, forever, "All that part of New

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(*a*) 1 Hutch. Hist. 96.
(*b*) Ibid. 96, 97.
(*c*) 1 Hol. An. 260; 1 Chalm. Ann. 299.

England, in America, which lies and extends itself from a river there, called Naragansett river, the space of forty leagues upon a straight line near the sea shore, towards the south-west, west and by south, or west as the coasts lieth toward Virginia, accounting three English miles to the league, and all and singular the lands and hereditaments lying and being within the limits aforesaid, north and south in latitude, and in length and longitude of and within all the breadth aforesaid from the northern ocean and the south seas, &c."(*a*)

This was the original patent of Connecticut. The settlers of the two colonies of Connecticut both claimed as patentees under Viscount Lord Say and Seal, and his associates.(*b*)

§ 65. The Connecticut colonists continued to act under their original voluntary association until January 14th, 1639, when all the free planters convened at Hartford, and after mature deliberation, adopted a constitution of government which was admirably adapted to the wants and necessities of the people. It guarded against any encroachments upon the rights of the subjects. It formed the basis of the most free and happy constitution of civil government which was ever formed. It is not a matter of surprise that it has received the admiration of historians and statesmen in after ages, when, (as remarked by a historian,) "it is remembered that it originated at a period when the lights of civil liberty were wholly extinguished in most parts of the earth, the rights of men but little understood, and less regarded, by the potentates of this world." Its introduction declared, that for the establishment of order and of government, they associated and conjoined themselves to be one public state or commonwealth, and did, for them-

(*a*) 1 Trumb. Hist. 27. (*b*) Ibid. 28.

selves and successors, and such as should be at any time joined to them, confederate together *to maintain the liberty and purity of the gospel which they professed*, and the discipline of the church according to its institutions, and in all civil affairs to be governed according to such laws as should be made according to the constitution which they were then about to adopt.

The constitution then ordained that there should be annually two general courts or assemblies; one on the second Thursday in April, and the other on the second Thursday in September: that the first should be a court of elections, in which should be annually chosen at least six magistrates, and all other public officers: that a governor should be chosen distinct from the six magistrates, for one year, and until another should be chosen and sworn. The governor and magistrates should be sworn to a faithful execution of the laws of the colony, and in cases where there was no express law established, to be governed by the Divine word. The choice of officers was to be made by the whole body of the freemen convened in general election. All persons who had been received as members of the several towns by a majority of the inhabitants, and had taken the oath of fidelity to the commonwealth should be admitted freemen of the colony. It required the governor and magistrates should be elected by ballot; the governor by the greatest number of votes, and magistrates by a majority. If at any time it should happen that six should not have a majority, in that case those who had the greatest number of suffrages should stand as duly elected for that year.

No person could be governor, unless a member of some church, and had previously been a magistrate in the colony; nor could any man be elected to the office more than once in ten years. No one could be chosen unto the magistracy who was not a freeman of the colony, and had been nominated either by the freemen or

the general court. The assembly were authorized to nominate in cases in which they judged it expedient. Neither the governor nor magistrates might execute any part of their office until they had been publicly sworn in the face of the general assembly. The several towns were required to send their respective deputies to the election, and when it was finished, they should proceed to any further service as at any other time, that of enacting of laws, and any other public service. The governor was authorized, either by himself or his acting secretary, to issue his warrant for calling the assembly, one month at least before the time of their appointed meetings: upon particular emergencies he might convene them in seventeen days, or even upon shorter notice, stating his reasons in the warrant. Upon the reception of the governor's warrant, in April and September, the constables of the respective towns were obliged to warn all the freemen to elect and send their deputies. Windsor, Hartford and Wethersfield, were required to send four deputies each to every general court, and the other towns which should be added to the colony in the future, should send such number as the court should determine proportionate to the body of their freemen. The deputies were declared to be vested with the whole power of the respective towns which they represented. They had authority to meet and determine their own election, and to fine any person who should intrude himself upon them, when he had not been duly chosen, or to fine any of their members for disorderly conduct when they were assembled. Provision was made that in case the governor and the major part of the magistrates should, upon any urgent occasion, neglect or refuse to call an assembly, the freemen should petition them to summon one; and if, upon the petition of a major part of the freemen in the colony, they still neglected or refused, then the constables of the several towns should, upon the petition of

the major part of the freemen, convoke an assembly. That when the assembly was thus convened, it should have power to choose a moderator. When it was thus formed, it should exercise all the powers of any other general assembly. Particularly, it was authorized to call any court, magistrate, or any other person before it; and to displace, or inflict penalties, according to the nature of the offence. All general assemblies called by the government, were to consist of the governor, four magistrates, and the major part of the deputies. When there was an equal vote, the governor had a casting vote. Provision was made, that no general court should be adjourned or dissolved without the consent of the major part of the members; and that whenever a tax was laid upon the inhabitants, the sum to be paid by each town should be determined by a committee consisting of an equal number from each of the respective towns. The form of oaths to be administered to the governor and magistrates was also adopted in the general convention of the free planters.

§ 66. Such in substance, was the original constitution of Connecticut, of which a modern historian with great propriety has said, "More than two centuries have elapsed, the world has been made wiser by the most various experience, political institutions have become the theme on which the most powerful and cultivated minds have been employed, and so many constitutions have been framed, or reformed, stifled or subverted, that memory may despair of a complete catalogue; but the people have found no reason to deviate from the frame of government established by their fathers. No jurisdiction in the English monarch was recognized: the laws of honest justice were the basis of this commonwealth, and therefore its foundations were lasting. These humble emigrants invented an admirable system, for they were near nature, listened willingly to her voice,

and easily copied her forms. No ancient usages, no hereditary differences of rank—no established interest, impeded the application of the principles of justice. Freedom springs spontaneously into life, the artificial distinctions of society require centuries to ripen!

History has ever celebrated the heroes who have won laurels in scenes of carnage; has it no place for the founders of states? the wise legislators who struck the rock in the wilderness so that the waters of liberty gushed forth in copious and perennial fountains? They who judge of men by their services to the human race, will never cease to honor the memory of Hooker and Haines."(*a*)

This constitution continued to be the fundamental law of the colony during the whole period of its independent existence, and its spirit was introduced into the charter of 1662, and its influence felt even down to the year 1818, when many of its main features were incorporated into the present constitution of the state of Connecticut.

Agreeably to its provision, the freemen of the colony convened at Hartford, on the second Thursday of April, and elected the officers of government. The general assembly proceeded as they had leisure, and as occasion required, to enact a system of laws. The laws at first were few, and time was taken to consider and digest them. The first statute in the Connecticut code is a kind of declaration, or bill of rights. It ordains that no man's life shall be taken away—no man's honor or good name be stained—no man's person shall be arrested, restrained, banished, dismembered, nor any wise punished—that no man shall be deprived of his wife or children; no man's goods or estate shall be taken away

(*a*) Bancroft's History, vol. i. p. 402.

from him, nor in any wise endangered, under color of law, or constitutional authority, unless it should be some express law of the colony warranting the same, established by the general court and sufficiently published; or, in case of the defect of such law in any particular case, by some clear and plain rule of the Word of God, in which the whole court should concur. It was also ordained that all persons in the colony, whether inhabitants or not, should enjoy the same laws and justice, without partiality or delay. Their general precepts bore the same aspect, and breathed the same spirit of liberty and safety, with respect to the subjects universally, which is exhibited in the constitution.

In the 14th year of Charles II., (1662,) Connecticut, being desirous of some more potent friend and ally, and proposing to herself other advantages by a connection with the crown of England, as a free trade with an old manufacturing country; also, the extinguishment of the claims which the crown had upon the lands in right of discovery, and her sister state, Massachusetts, having led the way by forming a similar connection. They caused a constitution of government to be drawn up in the form of a charter, so as to include the colony of New Haven, which Mr. Winthrop, their agent, agreeably to the principles and spirit of their former government, presented to the king and council. And he, aided by Lord Say and Seal, obtained its confirmation in 1662, which conveyed the most ample privileges under the great seal of England.

By this charter they obtained from the crown a confirmation and guaranty of all their rights, prerogatives and powers, which they had enjoyed and exercised before as a sovereign and independent government. Also, a grant and confirmation of their title to the lands described in the charter, to hold in fee and common socage, with all the islands, waters, rivers, shores, fisheries,

quarries, mines, minerals, &c., reserving one-fifth part of the gold and silver, which might from time to time be gotten there, in lieu of all service, duties and demands, whatsoever: and also, all the rights and immunities of natural born subjects of the crown of England, with the privileges of free trade to all parts of the king's dominions. It ordained that John Wintworth, John Mason, and seventeen other persons therein named, and all such others as there were, or should thereafter be admitted and made free of the corporation, should forever after be a body corporate and politic in fact, and in name of "The Governor and Company of the English Colony of Connecticut, in New England in America."

§ 67. It ordained, among other things, there should be annually two general assemblies; one holden on the second Thursday of May, and the other on the second Thursday of October. This was to consist of the governor, deputy governor, and twelve assistants, with two deputies from every town or city. John Winthrop was appointed governor, and John Mason deputy governor, and the other persons therein named magistrates, until a new election should be made. By this the general assembly, consisting of the governor and council, composed of twelve assistants, seven of whom made a quorum, and the representatives of the people, not exceeding two from each town, were invested with supreme power of legislation; also of constituting courts, with final jurisdiction in all civil and criminal causes, of appointing judges, and all other officers of government necessary for the well ordering and governing the affairs of the colony, with this reservation only, that they should make no law repugnant to the laws of England, and this could hardly be called a restraint upon legislative power.

The style of enacting statutes was as follows: "Be it enacted by the governor and council and representatives,

in general court assembled, and by the authority of the same." Thus it will be perceived, that the colonists although they became connected with, and subordinate to the crown of England with the rights of subjects, yet that they assumed and claimed that they were under no obligation of obedience to the government and laws of the kingdom. This, it has been said, was upon three grounds: 1st. They were the laws of the realm of England, which could not extend to those who were out of it. 2d. They were inapplicable to their situation and circumstances in this country. 3d. Neither the parliament nor the people of England had any authority over them, to control their persons or to bind their property, derived either from conquest, compact, or from their being represented, actually or virtually, in the parliament of England, or from any other consideration whatever.(*a*)

The charter of 1662, contained a very extensive grant of political power. It authorized the company to have a common seal, to appoint judicatures, make freemen, constitute offices, establish laws, impose fines, assemble the inhabitants in martial array for common defence, and to exercise martial law in all cases in which it might be necessary. It also ordained, that all the king's subjects in the colony should enjoy all the privileges of free and natural subjects within the realm of England, and that the patent should always have the most favorable construction for the benefit of the governor and company.(*b*) This charter comprehended the colony of New Haven. It, however, did not yield to the government of Connecticut until after a most strenuous struggle and resistance to a union, until 1665, at which time they finally assented to it.

(*a*) Robt. Am. 6. (*b*) 1 Trumbull, 249.

§ 68. This leads us to the consideration of the second subdivision of this historical sketch, to wit: the history of the colony of New Haven, from its first settlement, to the time of its union with that of Connecticut.

Shortly after the removal and settlement in the colony of Connecticut, and while the settlers of that colony were engaged in laying the foundation of their civil and political institutions, a project was formed for the settlement of another colony at a place known to the Indians by the name of Quinipiack, afterwards called New Haven. On the 26th July, 1637, John Davenport, Samuel Eaton, and many others of character and fortune, arrived at Boston; who, from their character, were much pressed to settle in Massachusetts. Davenport, who was a learned and pious divine, and his congregation who had come over with him, determined upon the settlement of a distinct colony, and finally settled upon New Haven as the place of their residence. On the 30th of March, 1638, they sailed from Boston, and arrived at New Haven in about two weeks; and, on the 18th of April, 1838, they spent their first sabbath under a large and spreading oak, and listened to the oracles of God from their pastor and leader. The motives which influenced their principal men in undertaking this new settlement, was undoubtedly a desire of being at the head of a new government, modelled, both in civil and religious matters, agreeably to their own peculiar tenets; which led them to devise the formation of a civil and religious constitution as near as possible to scripture precepts and example.(*a*)

Soon after their arrival, after a day devoted to religious fasting and prayer, they entered into what they termed a plantation covenant; by which they bound

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(*a*) 1 Trumb. 95.

themselves, "That, as in matters that concern the gathering and ordering of a church, so also in public offices which concern civil order, as choice of magistrates and officers, making and repealing laws, dividing allotments of inheritance, and all things of a like nature, they would all of them, be ordered by the rules which the scripture held forth to them."

§ 69. They continued to act under this agreement until 1639, when, on the 4th of June, all the free planters met in a large barn; and in a very formal and solemn manner, proceeded to lay the foundation of their civil and religious polity. Their spiritual head introduced the business by preaching from these words—"Wisdom hath builded her house, she hath hewn out her seven pillars." The design of which was to show, that the church, the house of God, should be formed of seven pillars, or principal brethren, to whom all the others should be added. He then proceeded to represent to the planters, that they had met to consult respecting the settlement of a civil government, according to the will of God; and for the nomination of persons, who, by universal consent, were in all respects the best qualified for the foundation of a church. They then proceeded to the adoption of a fundamental law, which declared "That the scriptures hold forth a perfect rule for the direction and government of all men, in all duties which they are to perform to God and man, as well in families and commonwealths, as in matters of the church. That, as in matters which concerned the gathering and ordering of a church, so likewise in all public offices which concern civil order, as the choice of magistrates and officers, making and repealing laws, dividing allotments of inheritance, and all things of like nature, they would all be governed by those rules which the scriptures held forth to them. That all those who desired to be received as free planters, had settled in the plantation with

a purpose, resolution and desire, that they might be admitted unto church fellowship according to Christ. That all the free planters held themselves bound to establish such civil order, as might best conduce to the security of the church and peace of the ordinances to them and their posterity, according to God."

A committee of twelve were thereupon chosen for the purpose of selecting seven men qualified for the foundation work of organizing the government. Eaton, Davenport and five others were selected as the "*seven pillars*," for this new house of wisdom in the wilderness; who in August, 1639, assembled, possessing for a time the most absolute power, having abrogated every previous executive trust. They admitted to the court all church members.(*a*)

§ 70. It was decreed by the freemen that there should be a general court annually in the plantation in the last week of October. This was ordained a court of election, in which all the officers of the colony were to be chosen under the form of government here established. All government was originally in the church, and the members of the church elected the governor, magistrates, and all the other officers. The magistrates seemed first to have been no more than mere assistants to the governor, and had no right to act in any sentence or determination of the court. The general court consisted of the governor, deputy governor, magistrates, and two deputies from each plantation, and was declared to be "*The supreme power under God of this independent dominion*," and had authority "*to declare, forbid, and establish* the laws of God, the supreme Legislator, to make and enforce orders for smaller matters, not particularly determined in Scripture, according to the general rules of righteousness. To order all affairs of war and peace, and all matters rela-

(*a*) 1 Bancroft, 404.

tive to defending or fortifying the country. To receive and determine all appeals, civil or criminal, from any inferior court, in which they were to proceed according to Scripture light and laws, and orders agreeing therewith. A court of magistrates were to meet or be held twice every year to determine all weighty causes, civil or criminal, above those limited to plantation courts, and to receive and try all appeals from plantation courts.

In this court, when the voices were equal, the governor, or in his absence the deputy governor, had a casting voice. A court was established in each plantation, in which there were to be one or more magistrates. The freemen were to choose two, three, or four deputies to assist the magistrates for the trial of civil causes not exceeding £20, and criminal where the penalty did not exceed punishment in the stocks, whipping, or £5 fine. Their laws were in many respects copied from those of Massachusetts. But there was no such thing as a trial by jury either in civil or criminal cases. All matters of fact as well as of law were determined by the court.(*a*)

§ 71. No other laws were at first enacted except general resolutions. As the plantation enlarged and new towns were settled, new orders were given, until at length the General Court assumed a new form, and laws were enacted, and the civil polity of the colony gradually advanced in the science of civil government, and moulded its institution somewhat resembling that of Connecticut.(*b*)

Theophilus Eaton, the first governor of the colony, on entering upon the duties of the office in accordance with the religious sentiments of the colonists, received a charge from their pastor, from 1 Deut. 16, 17, "And I charged you Judges at that time, saying, Hear the causes between your brethren, and judge righteously between every man

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(*a*) 1 Hutch. 82, n. (*b*) 1 Trumb. 106, 7.

and his brother, and the stranger that is with him; Ye shall not respect persons in judgment, but ye shall hear the small as well as the great; Ye shall not be afraid of the face of man; for the judgment is God's; and the cause that is too hard for you bring it to me I will hear it."

If his Excellency lived up to the spirit of this charge, and adopted the principles which are embraced in it, he probably did that which should put modern political rulers to the blush in view of the marked distinction in this respect between ancient and modern rulers. In 1665, Governor Eaton had been requested to perfect a code of laws for this colony. For his assistance in the compilation, he was requested by the general court to consult the Rev. Mr. Cotton's discourse on civil government in a new plantation, and the laws of Massachusetts. Having completed the work, the laws having been examined and approved by the elders of the jurisdiction, they were presented to the general court, who ordered 500 copies to be printed: this was done in England, and were distributed to several towns in the colony. During this year, the colony was united with that of Connecticut, a union which was ever afterwards regarded by the colonists as a happy event, as one that contributed much to the peace, strength, welfare, and prosperity of both colonies. New Haven certainly could not have enjoyed a more benignant and republican form of government than that which had been already perfected in Connecticut, which by this act became its own.

Thus we have traced the history of the two colonies during the period of their separate existence, which brings us down to the period at which our third subdivision of the colonial history commences.

§ 72. The first general election after the union was held in May, 1665, at which John Winthrop was elected as governor, a proportionable number of the magistrates

were of the former colony of New Haven, all the towns sent deputies, and the assembly was one of the greatest harmony. They proceeded, and for the first time instituted county courts by name; two were to be held annually in New Haven, in June and November, to consist of five judges, two magistrates, and three justices of the quorum. A similar court was also appointed at New London, and at the October session another at Hartford. The county courts had cognizance of all cases except those of life, limb, or banishment, and in all cases over twenty shillings the law required that a jury should be empanelled.(*a*) A superior court of eight magistrates was appointed to be holden at Hartford, in May and October, and was always to be attended with a jury which had original jurisdiction for all capital actions of life, limb, and banishment, and appellate jurisdiction from the county courts. Until the year 1670, the great body of the freemen convened annually at Hartford, for the election of a governor, the magistrates, and civil officers appointed by the charter. At this time the freemen had become so numerous as to render it very expensive as well as inconvenient to continue this mode of election, and a change was then made by which it was provided, that thenceforth all the freemen without further summons should or might on the 2d Thursday of May, annually in person or in proxy attend at Hartford for the purpose of such election.(*b*)

§ 73. Prior to 1672, the colony had kept their laws in manuscript, and had promulgated them, by sending copies to be read publicly in every town. This year the first code of Connecticut was published. It was compiled by Roger Ludlow, Esq., and printed at Cambridge, Mass. It consisted of between seventy and eighty pages in small folio printed and of nearly the same number of

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(*a*) 1 Trumb. 316. (*b*) 1 Trumb. 318.

blank pages. The preface was written in the most religious manner. It was thus introduced, "To our beloved brethren and neighbours, the inhabitants of Connecticut. The general court of the colony, with grace and peace in our Lord Jesus." It recognized the design of the sub planters, "*who*," as the court expressed it, "*settled their foundations*" for the maintaining of "religion according to the gospel of our Lord Jesus," which it declared, "ought to be the endeavour of all those that shall succeede to uphold and encourage unto all generations." It was then enacted that every family should have a law book. The subsequent laws of the colony from 1672 to 1699, were subsequently inserted on the blank leaves of this book, when the book was filled up.

§ 74. The last year of the reign of Charles II. had been characterized by the most wanton violation of chartered rights and private property. To such an extent had it been carried, that the colonists were naturally led to the belief that nothing could be lost by a change of sovereigns, and evidently expected that greater security might be anticipated on his demise; accordingly, in 1685, on the accession of James II., the assembly addressed a letter of condolence to his majesty, on account of the demise of his brother, Charles II., and congratulated him on his peaceful succession, gave him assurance of their loyalty and attachment to the royal person and government, and besought him to continue to them their civil and religious privileges, and that he would preserve to them the peaceable enjoyment of their property. If the colonists entertained a hope that this righteous request would be granted, that hope was soon dispelled by the issuing of a *quo warranto* against the colony. With a return day, therein named, which it was well understood it would be impossible for it to comply with the exigencies of the writ, and under a penalty therein inserted that all its chartered rights would be vacated in case of

its neglect to appear at the time named. This mode of proceeding was in perfect keeping with the character of James II., who was an obstinate and cruel tyrant as well as a bigotted religionist, alike destitute of all principles of honor, faith or humanity. Indeed it very soon became too apparent that it was not to be expected that arguments drawn from reason, humanity, justice, charters, compacts, or any other consideration, would have the least influence over a monarch who trampled on the constitution, laws, and liberties of the English nation, and whose ministers and officers shed the blood of his subjects, and wreaked their vengeance on all who made even a show of opposition to their piratical proceedings.

§ 75. In October, 1687, Sir Edmund Andros, who had assumed the government of Massachusetts the previous year, arrived at Hartford, and in the name of the crown demanded the surrender of their charter. After much struggle and debate in the assembly and protests against this demand, which was continued until the evening, when the charter was produced and laid upon the table. After its production, suddenly the lights were extinguished, and Captain Wadsworth, in the most silent and secret manner, carried it off and secreted it in a hollow tree, which thereafter received the name of the Charter Oak, where it was kept secreted until the government was resumed. Andros, however, proceeded to declare the government dissolved, and held a brief and tyrannical dominion over the colony until the revolution in 1688, when the government was resumed by the colonists by their former magistrates, when the freemen voted, "they would re-establish government as it was before, and at the time Andros took it, and so have it proceede as it did before according to charter—engaged themselves to submit to it accordingly, until there should be a legal establishment amongst them. The assembly having formed and enacted, ordered and declared, that all the

laws of the colony made according to the charter, and courts constituted for the administration of government as they were before the late interruption, should be of full force and virtue for the future, and until it see cause to make further or other alterations, according to charter."(*a*)

The successors of the Stuarts silently suffered them to retain it until the American revolution without any struggle or resistance.

This charter continued to be maintained as the fundamental law of the state until the year 1818, when a new constitution of government was formed and adopted by the people.(*b*)

Subsequent to the American revolution all connection with the crown of England was broken off and dissolved. But notwithstanding this the constitution of the state until 1818 remained in all other respects the same unaltered basis of government, in its principles, regulations, and efficient powers, which it ever had been from its first formation and establishment. The legislature of the state, upon the declaration of independence being made on the 4th of July, 1776, made a declaration of the rights and privileges of the people of the state, wherein it was declared, "The people of this state, being by the providence of God free and independent, have the sole and exclusive right of governing themselves, as a free, sovereign, and independent state; and having from their ancestors derived a free and excellent constitution of government, whereby the legislature depends on the free and annual election of the people; they have the best security for the preservation of their civil and religious rights and liberties. And forasmuch as the free fruition of such liberties and privileges, as humanity,

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(*a*) 1 Trum. 377. (*b*) 1 Story, 76.

civility, and christianity call for, as is due to every man in his place and proportion, without impeachment and infringement, hath been and ever will be of church and commonwealth, and the denial thereof, the disturbance if not the ruin of both.

Be it enacted and declared by, &c., that the ancient form of civil government contained in the charter of Charles II., King of England, and adopted by the people of this state, shall be and remain the civil constitution of this state, under the sole authority of the people thereof, independent of any king or prince whatever. And that this republic is and shall forever be and remain a free, sovereign, and independent state, by the name of the state of Connecticut."

At as late a period as 1798, a devout wish was uttered by one of the ablest jurists of that state, that its citizens might glory in that system of government and jurisprudence which at the first was the product of wisdom, was perfected and matured by long experience, which had carried it safe through many a storm, withstood every attack for more than a century and a half, and which had grown venerable by age, and the wisdom of its regulations, and the rich profusion of blessings which it conferred as the noblest birthright of themselves and their children, and the highest interest and honor of the state as an independent member of a great nation and the rising empire of America.

§ 76. Until the session in October, 1698, the assembly consisted of but one house, and the magistrates and deputies acted together. At this session it was enacted that the general assembly should consist of two houses; that the governor or, in his absence, the deputy governor, and magistrates should compose the first, which should be called the upper house; that the other should consist of the deputies, regularly returned from the several towns in the colony, which should be called the lower house.

The lower house were authorized to choose a speaker to preside, and when formed, to make such officers and rules as they should judge necessary for their regulation. It was further enacted that no act should be passed into a law, nor any law already enacted be repealed, nor any other act proper to the general assembly be passed except by the consent of both houses. They also ordained at this session that the county courts should consist of one chief justice and two justices of the quorum.(*a*) The two houses did not, however, form separately until the session on 11th May, 1699.

Until 1708 the law required the governor to be chosen from among the magistrates. The democratic spirit of the age became dissatisfied with this provision, and at the May session, 1808, (13th May,) this law was repealed, and provision was made by which the freemen were at liberty to elect the governor from among themselves at large, and thus practically asserted the fundamental creed of all democratic institutions, that it is not place but merit which should entitle the citizen to places of power and trust.

§ 77. The subjects of legislation were generally such as the wants and necessities of an infant colony seemed to demand, and up to this period the semi-annual sessions of the assembly were usually very short, not exceeding ten or twelve days, and the expenses of administering the government very small—the whole not exceeding about £800. At the October session the superior court was made a circuit court, and was required to hold two terms annually in the respective counties of Hartford, New Haven, Fairfield, and New London.(*b*) It consisted of a chief justice and four other judges, three of whom made a quorum. The fees of the former were

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(*a*) 1 Trumb. 399. (*b*) Ibid. 452.

10*s.* per day while in the public service; the other judges were allowed the fees by law payable to the Bench.(*a*) All testamentary affairs were managed by a court of probate, in each county, of one judge and clerk, from which an appeal lay to the county court.(*b*)

The character of the laws of this colony bear so striking a resemblance to those of Massachusetts, that it is not deemed advisable to devote time to a separate consideration of them. Its criminal code declared those offences criminal which were so declared in the Holy Scriptures: those were idolatry, blasphemy of Father, Son, or Holy Ghost, witchcraft, murders, murder through guile by poisoning or other devilish practices, bestiality, sodomy, rape, man stealing, false witness, conspiracy against the colony, arson, children cursing or smiting father or mother, being a stubborn or rebellious son, and treason.(*c*)

The descent and distribution of real estate was among all the children, the eldest son to receive a double share. Fraudulent conveyances against creditors were declared void: lands were subject to claims of judgment creditors, to be set off on execution by the appraisal of three appraisers.(*d*)

Process in courts of justice were in the name of the king. Insolvents without any estate, might be relieved from imprisonment by two assistants, but if required by the creditor, must satisfy the debt by service. Bills and bonds were made assignable, and assignees might maintain suits in their own name.

Magistrates, justices of the peace, and ministers were

(*a*) 1 Trumbull, 453.
(*b*) Ibid. 453.
(*c*) Green's Colony Laws, ed. 1715, 1718, fol. New London, p. 12.
(*d*) Ibid. 33, 61, 164.

authorized to marry persons; and divorces *a vinculo* allowed for adultery, fraudulent contract, or desertion for three years. A maritime code was enacted regulating the rights and duties and authorities of ship owners, seamen, and others concerned in navigation.(*a*)

Bancroft says, "Connecticut from the first possessed unmixed popular liberty; the government was in honest and upright hands, and the little strifes of rivalry never became heated. The magistrates were sometimes persons of no ordinary endowments: but though gifts of learning and genius were valued, the state was content with virtue and single mindedness, and the public welfare never suffered at the hands of plain men. Education was cherished; religious knowledge was carried to the highest degree of refinement, alike in its application to moral duties, and to the mysterious questions on the nature of God, of liberty, and of the soul. Forestalling was successfully resisted. Education was always esteemed of deepest interest, and there were common schools from the first. But the political education of the people was due to the happy organization of the towns which here, as indeed in all New England, constituted each separate settlement a little democracy of itself. In Connecticut citizenship was acquired by inhabitancy, was lost by removal. Each town meeting was a little legislature; and all its inhabitants, the affluent and more needy, the wise and the foolish, were invested with equal franchises. There the taxes of the town were discussed and levied: there the village officers were chosen: there roads were laid out, and bridges voted: there the minister was elected, the representatives to the assembly were instructed. For more than a century peace was within its borders; and with tran-

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(*a*) 1 Story, 79, 80.

sient interruptions, its democratic institutions unharmed. For a century, with short exceptions, its history is the picture of colonial happiness. To describe its condition is but to enumerate the blessings of self-government as exercised by a community of farmers, who have leisure to reflect, who cherish education, and who have neither a nobility nor a populace."

Indeed, so enchanting is the picture drawn by this master mind, that one can hardly suppress the deep emotion which is excited by his concluding reflection, that "Those days will never return. Time, as it advances, never produces an old piece, but unfolds new scenes in the grand drama of human existence; scenes of more glory, of more wealth, of more action, but not of more tranquility and purity."

A distinguished writer and jurist, in speaking of the statute laws of Connecticut as securing and confirming the rights of the citizen, has said:

"Government and laws, have been erroneously considered, as originating in the prince or potentate, and the liberties and privileges enjoyed by their subjects as flowing from their free benignity and good will; for this cause the subjects exist only for their king; their lives, liberty and property are all devoted to his honor, pleasure and aggrandizement; whereas, the truth in fact is, that civil government is ordained of God, for the good of the people, and the constitution they adopt, and the persons they appoint to bear rule over them, to make and to execute the laws, the Almighty recognizes to be his ministers, acting under his authority, for the advancement of order, peace and happiness in society, by protecting its members in the quiet enjoyment of their natural, civil and religious rights and liberties. It is the office and duty of the supreme power of a state, to enact and in some proper manner promulgate to its citizens

and subjects the will of the state, which is the law respecting their rights, and their duties, that they may know how to preserve and enjoy the former, and comply with and perform the latter; also, the punishments annexed to the various infractions of the public will, thus declared and comprised in the laws.

"In republican governments, justice ought to be the principle, the public good the object, and reason and virtue the life and spirit of their laws. Statutes are made either in affirmance of natural rights and duties and declarative of them, or are positive regulations for political reasons, respecting certain matters and things, in themselves indifferent.

"The great end of civil government is social happiness; to induce us to respect the rights, interests, and feelings of others as our own, conformable to that great command in the law, which is the foundation of all relative duties from man to man; to love our neighbour as ourselves, and to do to all as we would they should do to us; knowing that the rights and enjoyments of others are the same to them as ours are to us, and that all men are brethren, have one father, who is God, created in his image, and connected in one great family under the government of their illustrious head the Prince of Peace, and of the potentates and powers of the earth. A practice universally adopted agreeable to these principles and rules, would, without the intervention of penal laws, render the security of individuals perfect, and advance the harmony, beauty, and happiness of society, beyond the power of language to describe.

"The legislatures of Connecticut, sensible of the importance of these objects, have calculated their laws in direct subserviency thereto; and to compel their refractory citizens to do through fear of punishment what they ought to do from principles of obedience. The first law in the book of statutes in order of time and in point of

importance, is 'that no man's life shall be taken away: no man's honor or good name shall be stained: no man's person shall be arrested, restrained, banished, dismembered, nor any ways punished: no man shall be deprived of his wife or children: no man's goods or estate shall be taken away from him, or any ways endamaged under the color of law or countenance of authority, unless clearly warranted by the laws of the state.'

"These great essential rights are derived from a source above all that is human; are holden by a tenure superior to what any power on earth can create or give; it is the Magna Charta of the Deity, the supreme ruler and governor, which grants and confirms these rights to man; they are therefore justly called natural rights, and the violation of them a crime against the law of nature, and what in law language is denominated *malum in se.*

"The legislature has laid this as the foundation on which to rear a system of laws and jurisprudence calculated to secure and advance in the best possible manner the good of individuals, and the public peace and safety."

CHAPTER VI.

OF LEGISLATIVE POWER UNDER STATE CONSTITUTIONS.

§ 78. We have in the preceding chapters considered the history of legislation among the ancients, and under the government of three of the American colonies. We shall in the next place consider the legislative power under the respective state constitutions. The bill of rights contained in the respective state constitutions, it is true, fixes limitations as well upon the power of civil magistrates as upon the legislative department of the governments, they at the same time are intended to secure the civil and political rights and liberty of the subject, and thus incidentally have an important and controlling influence upon the question of legislative authority, and must be taken into view in considering this branch of our subject.

The constitution of Maine contains the following explicit declaration of the object, design, and fundamental principles upon which the civil compact is founded.

"We, the people of Maine, in order to establish justice, ensure tranquillity, provide for our natural defence, promote our common welfare, and secure to ourselves and our posterity the blessings of liberty, acknowledging, with grateful hearts, the goodness of the Sovereign Ruler of the Universe in affording us an opportunity so favorable to the design; and imploring his aid and direction in its accomplishment, do agree to form ourselves into a free and independent state, by the style and title of the State of Maine, and do ordain and establish the following Constitution for the government of the same:

"All men are born equally free and independent, and

have certain natural, inherent, and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness. All power is inherent in the people; all free governments are founded in their authority, and instituted for their benefit: they have, therefore, an unalienable and indefeasible right to institute government, and to alter, reform, or totally change the same, when their safety and happiness require it. All men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no one shall be hurt, molested, or restrained in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, nor for his religious professions or sentiments, provided he does not disturb the public peace, nor obstruct others in their religious worship;—and all persons demeaning themselves peaceably, as good members of the state, shall be equally under the protection of the laws, and no subordination nor preference, of any one sect or denomination to another, shall ever be established by law, nor shall any religious test be required as a qualification for any office or trust under this state; and all religious societies in this state, whether incorporate, or unincorporate, shall at all times have the exclusive right of electing their public teachers, and contracting with them for their support and maintenance. Every citizen may freely speak, write, and publish his sentiments on any subject, being responsible for the abuse of this liberty. No laws shall be passed regulating or restraining the freedom of the press; and, in prosecutions for any publication respecting the official conduct of men in public capacity, or the qualifications of those who are candidates for the suffrages of the people, or where the matter pulished is proper for public information, the

truth thereof may be given in evidence; and in all indictments for libels, the jury, after having received the direction of the court, shall have a right to determine, at their discretion, the law and the fact. The people shall be secure in their persons, houses, papers, and possessions from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing shall issue without a special designation of the place to be searched, and the person or thing to be seized, nor without probable cause, supported by oath or affirmation. In all criminal prosecutions, the accused shall have a right to be heard by himself and his counsel, or either, at his election: to demand the nature and cause of the accusation, and have a copy thereof: to be confronted by the witnesses against him: to have compulsory process for obtaining witnesses in his favor: to have a speedy, public, and impartial trial; and, except in trials by martial law or impeachment, by a jury of the vicinity. He shall not be compelled to furnish or give evidence against himself, nor be deprived of his life, liberty, property, or privileges, but by judgment of his peers, or the law of the land. No person shall be held to answer for a capital or infamous crime, unless on a presentment or indictment of a grand jury, except in cases of impeachment, or in such cases of offences as are usually cognizable by a justice of the peace, or in cases arising in the army or navy, or in the militia when in actual service, in time of war or public danger. The legislature shall provide by law a suitable and impartial mode of selecting juries; and their usual number and unanimity, in indictments and convictions, shall be held indispensable. No person for the same offence shall be twice put in jeopardy of life or limb. Sanguinary laws shall not be passed; all penalties and punishments shall be proportioned to the offence; excessive bail shall not be required nor excessive fines imposed, nor cruel nor

unusual punishments inflicted. All persons, before conviction, shall be bailable except for capital offences, where the proof is evident, or the presumption great; and the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it. The legislature shall pass no bill of attainder, *ex post facto* law, nor law impairing the obligation of contracts, and no attainder shall work corruption of blood nor forfeiture of estate. Treason against this state shall consist only in levying war against it, adhering to its enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or confession in open court. The laws shall not be suspended, but by the legislature or its authority. No person shall be subject to corporal punishment under military law, except such as are employed in the army or navy, or in the militia when in actual service, in time of war, or public danger. The people have a right, at all times, in an orderly and peaceable manner, to assemble and consult upon the common good, to give instructions to their representatives, and to request of either department of the government, by petition or remonstrance, redress of their wrongs and grievances. Every citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned. No standing army shall be kept up in time of peace, without the consent of the legislature; and the military shall, in all cases, and in all times, be in strict subordination to the civil power. No soldier shall, in time of peace, be quartered in any house, without the consent of the owner or occupant, nor in time of war, but in a manner to be prescribed by law. Every person for an injury done him in his person, reputation, property, or immunities, shall have remedy by due course of law; and right and justice shall be administered freely and

without sale, completely and without denial, promptly and without delay. In all civil suits, and in all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practised: the party claiming the right may be heard by himself and his counsel, or either, at his election. Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it. No tax or duty shall be imposed without the consent of the people or their representatives in the legislature. No title of nobility or hereditary distinction, privilege, honor, or emolument, shall ever be granted or confirmed; nor shall any office be created, the appointment to which shall be for a longer time than during good behavior. The enumeration of certain rights shall not impair nor deny others retained by the people."

§ 79. By the constitution of this state, all the legislative power is vested in two distinct branches, a *House of Representatives*, and a *Senate*, each to have a negative on the other, and *both* to be styled the *Legislature of Maine;* and the style of their acts and laws shall be, "Be it enacted by the Senate and House of Representatives in Legislature assembled." *The House of Representatives* consists of not less than one hundred nor more than two hundred members, elected by qualified electors. The House of Representatives has the sole power of impeachment. The *Senate* consists of not less than twenty, nor more than thirty-one members, elected by qualified electors. The *Senate* has the sole power to try all impeachments; and when sitting for that purpose, are to be on oath or affirmation. Each body has the right to elect its own officers. Each house is the judge of the election or qualifications of its own members. A majority to constitute a quorum, and a smaller number may adjourn from day to day, and compel the absent members to attend, in such

manner and under such penalties as each house provides. Each house may expel or punish a member for disorderly conduct.

The legislature is required to convene on the first Wednesday of January, annually; and has full power to make and establish all reasonable laws and regulations for the defence and benefit of the people of the state, not repugnant to the state constitution or the constitution of the United States. Every bill or resolution having the force of law, to which the concurrence of both houses is necessary, except on questions of adjournment, which shall have passed both houses, must be presented to the governor, and if he approve it, he must sign it; if not, he must return it with his objections to the house in which it shall have originated, which must enter his objections at large on the journals, and proceed to re-consider it. If it shall then be passed by two-thirds of both houses, it becomes a law, and has the same effect as if it had been signed by the governor. But in such cases, the vote must be taken by yeas and nays, and the names of the persons voting for and against the bill or resolution must be entered on the journal of both houses respectively. If not returned by the governor in five days after it has been presented to him, Sundays excepted, it has the same effect as if signed by him—unless the legislature by an adjournment prevent a return, in which event it has the same force and effect, unless returned within three days after their next session.

§ 80. The preamble to the constitution of Massachusetts declares,

"The end of the institution, maintenance, and administration of government, is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying, in safety and tranquillity, their natural rights and the blessings of life: and whenever these great objects are not obtained,

the people have a right to alter the government, and to take measures necessary for their safety, prosperity, and happiness.

"The body politic is formed by a voluntary association of individuals. It is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation and a faithful execution of them; that every man may, at all times, find his security in them.

"We, therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the Great Legislator of the Universe, in affording us, in the course of His Providence, an opportunity, deliberately and peaceably, without fraud, violence, or surprise, of entering into an original, explicit, and solemn compact with each other; and of forming a new constitution of civil government, for ourselves and posterity; and devoutly imploring his direction in so interesting a design, do agree upon, ordain, and establish, the following declaration of rights and frame of government, as the constitution of the commonwealth of Massachusetts."

Then follows a declaration of rights of the inhabitants of the commonwealth of Massachusetts, which declares,

"All men are born free and equal, and have certain natural, essential, and unalienable rights: among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

"It is the right, as well as the duty, of all men in society, publicly, and at stated seasons, to worship the Supreme Being, the Great Creator and Preserver of the

Universe. And no subject shall be hurt, molested, or restrained in his person, liberty, or estate, for worshiping God in the manner and seasons most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.

"As the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality; and as these cannot be generally diffused throughout the community, but by the institution of a public worship of God, and of public institutions in piety, religion, and morality; therefore, to promote their happiness, and to secure the good order and preservation of their government, the people of this commonwealth have a right to invest their legislature with power to authorize and require, and the legislature shall, from time to time, authorize and require, the several towns, parishes, precincts, and other bodies politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of God, and for the support and maintenance of public protestant teachers of piety, religion, and morality in all cases, where such provision shall not be made voluntarily.

"All the people of the commonwealth have also a right to, and do, invest their legislature with authority to enjoin upon all the subjects an attendance upon the instructions of the public teachers, as aforesaid, at stated times and seasons, if there be any one whose instructions they can conscientiously and conveniently attend:

"Provided, notwithstanding, that the several towns, parishes, precincts, and other bodies politic, or religious societies, shall, at all times, have the exclusive right of electing their public teachers, and of contracting with them for their support and maintenance.

"All moneys paid by the subject to the support of

public worship, and of the public teachers aforesaid, shall, if he require it, be uniformly applied to the support of the public teacher or teachers of his own religious sect or denomination, provided there be any, on whose instruction he attends; otherwise it may be paid towards the support of the teacher or teachers of the parish or precinct in which the said moneys are raised.

"And every denomination of Christians, demeaning themselves peaceably, and as good subjects of the commonwealth, shall be equally under the protection of the law; and no subordination of any sect or denomination to another shall ever be established by law.

"The people of this commonwealth have the sole and exclusive right of governing themselves, as a free, sovereign, and independent state: and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right, which is not, or may not hereafter be by them expressly delegated to the United States of America, in congress assembled.

"All power residing originally in the people, and being derived from them, the several magistrates and officers of government vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them.

"No man, or corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public. And this title being, in nature, neither hereditary nor transmissible to children or descendants, or relations of blood, the idea of a man born a magistrate, lawgiver, or judge, is absurd and unnatural.

"Government is instituted for the common good: for the protection, safety, prosperity and happiness of the people: and not for the profit, honour, or private interest

of any one man, family, or any one class of men. Therefore, the people alone have an incontestable, unalienable, and indefeasible right to institute government, and to reform, alter, or totally change the same, when their protection, safety, prosperity, and happiness require it.

"In order to prevent those who are vested with authority from becoming oppressors, the people have a right, at such periods and in such manner as they shall establish by the frame of government, to cause their public officers to return to private life, and to fill up vacant places by certain and regular elections and appointments.

"All elections ought to be free: and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected for public employments.

"Each individual of the society has a right to be protected by it, in the enjoyment of his life, liberty, and property, according to the standing laws. He is obliged consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary. But no part of the property of any individual can, with justice, be taken from him, or applied to the public use, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

"Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive, in his person,

property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it—completely, and without any denial—promptly, and without delay—conformably to the laws.

"No person shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence against himself. And every person shall have a right to produce all proofs that may be favourable to him; to meet the witnesses against him, face to face, and be fully heard in his defence, by himself, or his counsel, at his election. And no person shall be arrested, imprisoned, or despoiled or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

"And the legislature shall not make any law that shall subject any person to a capital or infamous punishment (excepting for the government of the army and navy) without trial by jury.

"In criminal prosecutions the verification of facts, in the vicinity where they happen, is one of the greatest securities of the life, liberty, and property of the citizen.

"Every person has a right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order, in a warrant to a civil officer, to make search in all suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons, or objects of search, arrest or seizure. And no warrant ought to be issued but in such cases, and with the formalities prescribed by the laws.

"In all controversies concerning property, and in all suits between two or more persons, (except in cases in which it has heretofore been otherwise used and practised,) the parties have a right to a trial by jury; and this method of procedure shall be held sacred,—unless, in cases arising on the high seas, and such as relate to mariner's wages, the legislature shall hereafter find it necessary to alter it.

"The liberty of the press is essential to security of freedom in a state; it ought not, therefore, to be restrained in this commonwealth.

"The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained, without the consent of the legislature: and the military power shall always be held in exact subordination to the civil authority, and be governed by it.

"A frequent recurrence to the fundamental principles of the constitution, and a constant adherence to those of piety, justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the advantages of liberty, and to maintain a free government. The people ought, consequently, to have a particular attention to all those principles, in the choice of their officers and representatives, and they have a right to require of their lawgivers and magistrates, an exact and constant observance of them, in the formation and execution of all laws necessary for the good administration of the commonwealth.

"The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instruction to their representatives; and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.

"The power of suspending the laws, or the execution

of the laws, ought never to be exercised but by the legislature; or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for.

"The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.

"The legislature ought frequently to assemble, for the redress of grievances, for correcting, strengthening, and confirming the laws, and for making new laws, as the common good may require.

"No subsidy, charge, tax, impost, or duties, ought to be established, fixed, laid, or levied, under any pretext whatever, without the consent of the people, or their representatives in the legislature.

"Laws made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government.

"No person ought, in any case, or in any time, to be declared guilty of treason or felony by the legislature.

"No magistrate, or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.

"In time of peace, no soldier ought to be quartered in any house, without the consent of the owner; and in time of war, such quarters ought not to be made, but by the civil magistrates, in manner ordained by the legislature.

"No person can, in any case, be subjected to law martial, or to any penalties or pains by virtue of that law, (except those employed in the army or navy, and

except the militia in actual service,) but by the authority of the legislature.

"It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent, as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well; and that they should have honorable salaries, ascertained and established by standing laws.

"In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end that it may be a government of laws, and not of men."

§ 81. By the constitution of this state, the legislative department is formed of two branches, a *Senate* and *House of Representatives*, each having a negative on the other. They assemble every year, and are styled "*The General Court of Massachusetts.*" They have full power and authority to erect and constitute judicatures and courts of record, or other courts, to be held in the name of the commonwealth to hear, try and determine, all causes. They have full power and authority to make, ordain and establish, all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions, or instructions, either with or without penalties, either for civil or military purposes; to impose and levy taxes, duties and excises; to set forth the powers and duties of

the civil and military officers, and to provide for the defence and support of government. The *Senate* consists of forty persons, to be annually elected by the freeholders and other inhabitants of the commonwealth, for the districts set apart for them by the General Court. The *Senate* is the first branch of the legislature: it has full power to determine its own proceedings, choose its own officers, and to be a court, with full authority to hear and determine all impeachments made by the House of Representatives against any officer or officers of the commonwealth; not less than sixteen members to constitute a quorum.

The *House of Representatives* is a representation of the people annually elected, and founded upon the principles of equality; elected according to the number of ratable polls to which each town is entitled. They have power to impose fines upon towns as shall neglect to choose and return members to represent the same. The House of Representatives is the grand inquest of the commonwealth, and all impeachments are to be made by them and tried by the senate.

They have power to make all money bills with the consent of the senate, the bills to originate with the house. Not less than sixty members to constitute a quorum. It judges of the return and election of its own members, elects its own officers, punishes its members for any misconduct towards themselves, or for a breach of the public peace. No member can be arrested or held to bail while in the assembly, or in going to or returning from it.

The senate has the same powers in like cases.

The senate and house together try all cases where their rights and privileges are concerned, or their own members.

No bill or resolve of the senate or house of represen-

tatives can become a law, or have force as such, until it has been laid before the governor for his revisal, who, if he approve it, must sign it: but if not, he must return it with his objections in writing to the house in which it originated, which must enter his objections at large on their records, and re-consider it; and if passed with the concurrence of two-thirds of each house, it then has the force of a law. But in such cases, the vote must be by yeas and nays, and the names of those voting for or against it entered on the record. By an amendment to the constitution it is provided, "If any bill or resolve shall be objected to, and not approved of by the governor; and if the general court shall adjourn within five days after the same shall have been laid before the governor for his approbation, and thereby prevent his returning it with his objections, as provided by the constitution; such bill or resolve shall not become a law, nor have force as such."

§ 82. The constitution of New Hampshire, as altered and amended on the second Wednesday of February, 1792, contains a bill of rights, as follows:

"All men are born equally free and independent: Therefore, all government, of right, originates from the people, is founded in consent, and instituted for the general good.

"All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty, acquiring, possessing, and protecting property; and, in a word, of seeking and obtaining happiness.

"When men enter into a state of society, they surrender up some of their natural rights to that society, in order to ensure the protection of others; and without such an equivalent the surrender is void.

"Among the natural rights, some are in their very nature unalienable, because no equivalent can be given

or received for them. Of this kind are the *rights of conscience*.

"Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience and reason; and no person shall be hurt, molested, or restrained in his person, liberty, or estate, for worshiping God in the manner most agreeable to the dictates of his own conscience, or for his religious profession, sentiments, or persuasion; provided he doth not disturb the public peace, or disturb others in their religious worship.

"As morality and piety, rightly grounded on evangelical principles, will give the best and greatest security to government, and will lay, in the hearts of men, the strongest obligations to due subjection; and as the knowledge of these is most likely to be propagated through a society by the institution of the public worship of the Deity, and of public instruction in morality and religion; therefore, to promote these important purposes, the people of this state have a right to empower, and do hereby fully empower, the legislature, to authorize, from time to time, the several towns, parishes, bodies corporate, or religious societies, within this state, to make adequate provision, at their own expense, for the support and maintenance of public protestant teachers of piety, religion, and morality:

"*Provided, notwithstanding*, That the several towns, parishes, bodies corporate, or religious societies, shall at all times have the exclusive right of electing their own public teachers, and of contracting with them for their support and maintenance: And no person of any one particular religious sect or denomination, shall ever be compelled to pay towards the support of the teacher or teachers of another persuasion, sect, or denomination.

"And every denomination of Christians, demeaning themselves quietly, and as good citizens of the state,

shall be equally under the protection of the law; and no subordination of any one sect or denomination to another, shall ever be established by law.

"And nothing herein shall be understood to affect any former contracts made for the support of the ministry; but all such contracts shall remain, and be in the same state, as if this constitution had not been made.

"The people of this state have the sole and exclusive right of governing themselves as a free, sovereign, and independent state; and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right, pertaining thereto, which is not, or may not hereafter be, by them expressly delegated to the United States of America, in congress assembled.

"All power residing originally in, and being derived from the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them.

"No officer or place whatsoever, in government, shall be hereditary—the ability and integrity requisite in all not being transmissible to posterity or relations.

"Government being instituted for the common benefit, protection, and security of the whole community, and not for the private interest or emolument of any one man, family, or class of men; therefore, whenever the ends of the government are perverted, or public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to, reform the old, or establish a new government. The doctrine of non-resistance against arbitrary power and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.

"All elections ought to be free, and every inhabitant of the state, having the proper qualifications, has an equal right to elect, and be elected, into office.

"Every member of the community has a right to be

protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share to the expense of such protection, and to yield his personal service when necessary, or an equivalent. But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. Nor are the inhabitants of this state controllable by any other laws than those to which they, or their representative body, have given their consent.

"No person who is conscientiously scrupulous about the lawfulness of bearing arms, shall be compelled thereto, provided he will pay an equivalent.

"Every citizen of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without denial; promptly, and without delay, conformable to the laws.

"No person shall be held to answer for any crime or offence, until the same is fully and plainly, substantially, and formally, described to him: nor be compelled to accuse or furnish evidence against himself. And every person shall have a right to produce all proofs that may be favourable to himself; to meet the witnesses against him face to face; and to be fully heard in his defence, by himself and counsel. And no person shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

"No person shall be liable to be tried, after an acquittal, for the same crime or offence. Nor shall the legislature make any law that shall subject any person to a capital punishment, (excepting for the government

of the army and navy, and the militia in actual service,) without trial by jury.

"In criminal prosecutions, the trial of facts, in the vicinity where they happen, is so essential to the security of the life, liberty, and estate, of the citizens, that no crime or offence ought to be tried in any other county than that in which it is committed, except in cases of general insurrection in any particular county, when it shall appear to the judges of the superior courts that an impartial trial cannot be had in the county where the offence may be committed, and upon their report the legislature shall think proper to direct the trial in the nearest county in which an impartial trial can be obtained.

"All penalties ought to be proportioned to the nature of the offence. No wise legislature will affix the same punishment to the crimes of theft, forgery, and the like, which they do to those of murder and treason. Where the same undistinguished severity is exerted against all offences, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do the lightest offences. For the same reason, a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate, mankind.

"Every person hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. Therefore, all warrants to search suspected places, or arrest a person for examination or trial, in prosecution for criminal matters, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in a warrant of a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property,

be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued, but in cases, and with the formalities, prescribed by law.

"In all controversies concerning property, and in all suits between two or more persons, excepting in cases wherein it hath been heretofore otherwise used and practised, the parties have a right to a trial by jury; and this right shall be deemed sacred and inviolable; but the legislature may, by the constitution, be empowered to make such regulations as will prevent parties from having as many trials by jury, in the same suit or action, as hath been heretofore allowed and practised, and to extend the civil jurisdiction of justices of the peace to the trials of suits where the sum demanded in damages doth not exceed four pounds, saving the right of appeal to either party. But no such regulations shall take away the right of trial by jury, in any case not in this article before excepted, unless in cases respecting mariners' wages.

"In order to reap the fullest advantage of the inestimable privilege of the trial by jury, great care ought to be taken that none but qualified persons should be appointed to serve; and such ought to be fully compensated for their travel, time, and attendance.

"The *liberty of the press* is essential to the security of freedom in a state; it ought, therefore, to be inviolably preserved.

"Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offences.

"A well regulated militia is the proper, natural, and sure defence of a state.

"Standing armies are dangerous to liberty, and ought

not to be raised or kept up, without the consent of the legislature.

"In all cases, and at all times, the military ought to be under strict subordination to, and governed by the civil power.

"No soldier, in time of peace, shall be quartered in any house, without the consent of the owner; and in time of war, such quarters ought not to be made but by the civil magistrate, in a manner ordained by the legislature.

"No subsidy, charge, tax, impost, or duty, shall be established, fixed, laid, or levied, under any pretext whatsoever, without the consent of the people, or their representatives in the legislature, or authority derived from that body.

"The power of suspending the laws, or the execution of them, ought never to be exercised but by the legislature, or by authority derived therefrom, to be exercised in such particular cases only as the legislature shall expressly provide for.

"The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any action, complaint, or prosecution, in any other court or place whatsoever.

"The legislature shall assemble for the redress of public grievances, and for making such laws as the public good may require.

"The people have a right, in an orderly and peaceable manner, to assemble and consult upon the public good, give instructions to their representatives, and to request of the legislative body, by way of petition or remonstrance, redress of the wrongs done them, and of the grievances they suffer.

"No magistrate or court of law shall demand excessive

bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.

"No person can, in any case, be subjected to law martial, or to any pains or penalties by virtue of that law, except those employed in the army or navy, and except the militia in actual service, but by authority of the legislature.

"It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws and administration of justice. It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit. It is therefore not only the best policy, but for the security of the rights of the people, that the judges of the supreme judicial court should hold their offices so long as they behave well; subject, however, to such limitations, on account of age, as may be provided by the constitution of the state; and that they should have honourable salaries, ascertained and established by standing laws.

"Economy being a most essential virtue in all states, especially in a young one, no pension shall be granted but in consideration of actual services; and such pensions ought to be granted with great caution by the legislature, and never for more than one year at a time.

"In the government of this state, the three essential powers thereof, to wit: the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connexion that binds the whole fabric of the constitution in one indissoluble bond of unity and amity.

"A frequent recurrence to the fundamental principles of the constitution, and a constant adherence to justice,

moderation, temperance, industry, frugality, and all the social virtues, are indispensably necessary to preserve the blessings of liberty and good government; the people ought, therefore, to have a particular regard to all those principles in the choice of their officers and representatives; and they have a right to require of their lawgivers and magistrates an exact and constant observance of them in the formation and execution of the laws necessary for the good administration of the government."

§ 83. The legislative power of this state is vested by the constitution in a *Senate* and *House of Representatives*, each having a negative on the other; and are styled "The General Court of New Hampshire." This court has full power and authority to erect and constitute all courts, to hear, try and determine all causes, whether civil or criminal, of whatever kind soever; and also, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions, with or without penalties, not repugnant to the constitution, as they may judge for the benefit and welfare of the state, and for the governing and ordering thereof, and of the citizens of the same, for the necessary support and defence of the government of the state; and to name and settle annually, or provide by fixed laws, the naming and settling of all civil officers within the state; such officers excepted whose election or appointment is otherwise provided for; and to prescribe the duties, powers, and limits, to all the civil and military officers; and also to impose and levy fines, duties, imposts, taxes, and assessments, upon the inhabitants of the state for the support of government.

The *Senate* consists of twelve members, elected annually: it is the first branch of the legislature. The Senate has full power to elect its own officers, judge of the returns and election of its members, to hear and try all

impeachments against the officers of the state, to issue summons, and compel the attendance of witnesses, with all the powers necessary to a court of trials.

The *House of Representatives* is composed of members annually elected, and is founded upon principles of equality; elected according to the number of ratable votes in each town. This branch of the legislature is the grand inquest of the state, and all impeachments originate with them, but are tried by the senate. All money bills must originate in the house of representatives; but the senate may propose or concur with amendments, as on other bills. A majority constitutes a quorum; but when less than two-thirds of the house of representatives elected shall be present, the assent of two-thirds of those members is necessary to render their acts and proceedings valid. They have power to choose their own officers, and are the judges of the elections and qualifications of their members; and to punish their members for contempt, or a breach of the peace.

The journal of the proceedings, and all the public acts of both houses must be printed immediately after every adjournment or prorogation. Every bill and resolve which shall have passed both houses must, before it becomes a law, be presented to the governor; and, if he approves it, he must sign it; and the same course of proceeding is required in case of his disapproval, as under the constitution of Massachusetts, before cited.

§ 84. The constitution of Vermont contains the following declaration of rights:

"That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety; therefore, no male person, born in this country, or brought from over sea, ought to be holden by law to

serve any person as a servant, slave, or apprentice, after he arrives to the age of twenty-one years; nor female, in like manner, after she arrives to the age of eighteen years, unless they are bound by their own consent, after they arrive to such age, or bound by the law for the payment of debts, damages, fines, costs, or the like.

"That private property ought to be subservient to public uses when necessity requires it; nevertheless, when any person's property is taken for the use of the public, the owner ought to receive an equivalent in money.

"That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God: and that no man ought to, or of right can, be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of his conscience; nor can any man be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship; and that no authority can or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner control, the rights of conscience in the free exercise of religious worship. Nevertheless, every sect or denomination of Christians ought to observe the Sabbath, or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God.

"Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character: he ought to obtain right and justice freely, and without being obliged to purchase it; completely,

and without any denial; promptly, and without delay; conformably to the law.

"That the people of this state, by their legal representatives, have the sole, inherent, and exclusive right of governing and regulating the internal police of the same.

"That all power being originally inherent in, and consequently derived from, the people; therefore, all officers of government, whether legislative or executive, are their trustees and servants, and at all times, in a legal way, accountable to them.

"That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.

"That all elections ought to be free and without corruption, and that all freemen, having a sufficient evidence, common interest with, and attachment to the community, have a right to elect officers, and be elected into office, agreeably to the regulations made in this constitution.

"That every member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal service, when necessary, or an equivalent thereto; but no part of any person's property can be justly taken from him, or applied to public uses, without his consent, or that of the representative body of freemen; nor can any man, who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he

will pay such equivalent; nor are the people bound by any law but such as they have in like manner assented to, for their common good; and previous to any law being made to raise a tax, the purpose for which it is to be raised ought to appear evident to the legislature to be of more service to the community than the money would be if not collected.

"That, in all prosecutions for criminal offences, a person hath a right to be heard by himself and his counsel; to demand the cause and nature of his accusation; to be confronted with the witnesses; to call for evidence in his favor, and a speedy public trial, by an impartial jury of his country; without the unanimous consent of which jury, he cannot be found guilty; nor can he be compelled to give evidence against himself; nor can any person be justly deprived of his liberty, except by the laws of the land, or the judgment of his peers.

"That the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and, therefore, warrants without oath or affirmation first made, affording sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places; or to seize any person or persons, his, her, or their property, not particularly described, are contrary to that right, and ought not to be granted.

"That when an issue in fact, proper for the cognizance of a jury, is joined in a court of law, the parties have a right to trial by jury, which ought to be held sacred.

"That the people have a right to a freedom of speech, and of writing and publishing their sentiments, concerning the transactions of government, and therefore the freedom of the press ought not to be restrained.

"The freedom of deliberation, speech, and debate, in

the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.

"The power of suspending laws, or the execution of laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases as this constitution, or the legislature, shall provide for.

"That the people have a right to bear arms for the defence of themselves and the state; and, as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power.

"That no person in this state can, in any case, be subjected to law martial, or to any penalties or pains by virtue of that law, except those employed in the army, and the militia in actual service.

"The frequent recurrence to fundamental principles, and firm adherence to justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the blessings of liberty, and keep government free; the people ought, therefore, to pay particular attention to these points, in the choice of officers and representatives, and have a right, in a legal way, to exact a due and constant regard to them, from their legislators and magistrates, in making and executing such laws as are necessary for the good government of the state.

"That all people have a natural and inherent right to emigrate from one state to another that will receive them.

"That the people have a right to assemble together to consult for their common good: to instruct their representatives: and apply to the legislature for redress of grievances by address, petition, or remonstrance.

"That no person shall be liable to be transported out of this state for trial of any offence committed within the same."

§ 85. The legislature of the commonwealth of Vermont, according to its constitution, is vested in a *House of Representatives*, and consists of persons most noted for wisdom and virtue, chosen by ballot annually. They have power to elect their own officers, prepare bills and enact them into laws, judge of the election and qualifications of their own members, expel or punish them for misdemeanors, impeach state criminals, grant charters of incorporations, constitute towns, cities and counties, and elect judges, sheriffs, and justices; and together with the council, elect all military officers, and have all power necessary for the legislature of a free state. The style of the laws passed is, "It is hereby enacted by the General Assembly of the state of Vermont."

By sec. 16 of chapter 2, it is provided, "To the end that laws, before they are enacted, may be more maturely considered, and the inconvenience of hasty determinations, as much as possible, prevented, all bills which originate in the assembly shall be laid before the governor and council for their revision and concurrence, or proposals of amendment; who shall return the same to the assembly, with their proposals of amendment, if any, in writing; and if the same are not agreed to by the assembly, it shall be in the power of the governor and council to suspend the passing of such bill until the next session of the legislature: Provided, that if the governor and council shall neglect or refuse to return any such bill to the assembly, with written proposals of amendment, within five days, or before the rising of the legislature, the same shall become a law."

§ 86. The Constitution of Connecticut contains the following preamble and declaration of rights:

"The people of Connecticut, acknowledging, with

gratitude, the good providence of God, in having permitted them to enjoy a free government, do, in order more effectually to define, secure, and perpetuate the liberties, rights, and privileges which they have derived from their ancestors, hereby, after a careful consideration and revision, ordain and establish the following constitution and form of civil government.

"That the great and essential principles of liberty and free government may be recognized and established, we declare:

"That all men, when they form a social compact, are equal in rights: and that no man, or set of men, are entitled to exclusive public emoluments or privileges from the community.

"That all political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and that they have at all times an undeniable and indefeasible right to alter their form of government in such manner as they may think expedient.

"The exercise and enjoyment of religious profession and worship, without discrimination, shall for ever be free to all persons in this state, provided that the right hereby declared and established shall not be so construed as to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the state.

"No preference shall be given by law to any Christian sect, or mode of worship.

"Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty.

"No law shall ever be passed to curtail or restrain the liberty of speech or of the press.

"In all prosecutions or indictments for libels, the truth may be given in evidence, and the jury shall have a right

to determine the law and the facts, under the direction of the court.

"The people shall be secure in their persons, houses, papers, and possessions, from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue, without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation.

"In all criminal prosecutions, the accused shall have a right to be heard, by himself and by counsel: to demand the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his favor; and in all prosecutions by indictment or information, a speedy public trial by an impartial jury. He shall not be compelled to give evidence against himself, nor be deprived of life, liberty, or property, but by due course of law. And no person shall be holden to answer for any crime, the punishment of which may be death or imprisonment for life, unless on a presentment or an indictment of a grand jury; except in the land or naval forces, or in the militia, when in actual service, in time of war or public danger.

"No person shall be arrested, detained, or punished, except in cases clearly warranted by law.

"The property of no person shall be taken for public use, without just compensation therefor.

"All courts shall be open; and every person, for an injury done him, in his person, property, or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay.

"Excessive bail shall not be required, nor excessive fines imposed.

"All prisoners shall, before conviction, be bailable by sufficient sureties, except for capital offences, where the proof is evident, or the presumption great; and the

privileges of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require it; nor in any case, but by the legislature.

"No person shall be attainted of treason or felony by the legislature.

"The citizens have a right, in a peaceable manner, to assemble for their common good, and to apply to those invested with the powers of government for redress of grievances, or other proper purposes, by petition, address, or remonstrance.

"Every citizen has a right to bear arms in defence of himself and the state.

"The military shall, in all cases, and at all times, be in strict subordination to the civil power.

"No soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

"No hereditary emoluments, privileges, or honours shall ever be granted or conferred in this state.

"The right of trial by jury shall remain inviolate."

§ 87. The Constitution of this state declares all the legislative power of that state to be vested in two distinct branches; the one is styled the *Senate*, and the other the *House of Representatives*, and both together are called "*The General Assembly.*" The style of the laws is "Be it enacted by the senate and house of representatives in general assembly convened."

The *Senate* consists of twelve members, annually elected. The *House of Representatives* consists of electors residing in towns from which they are elected, and are proportionate to the inhabitants. The senate has power to elect their own officers, except the president. The house to elect all its officers, and a majority in each branch constitutes a quorum. Each house deter-

mines the rule of its proceedings, punishes its members, and have all the powers necessary for a legislature.

The debates of each house are required to be public, except on such occasions as, in the opinion of the house, may require secresy; and each house must keep a journal of its proceedings, and publish the same in case one-fifth of its members shall require it, except such parts as a majority shall deem to require secresy.

Every bill which shall have passed both houses, must be presented to the governor, and if he approve it, he must sign it; and if not, return it to the house in which it originated, with his objections, within three days, Sundays excepted. When returned, his objections must be entered on the journal; and if the legislature, upon re-consideration, shall pass it, it becomes a law. If the legislature by its adjournment, prevent its return within the time prescribed, it does not become a law.

§ 88. The first Constitution of New York was adopted in the year 1777: it was afterwards amended in 1801. In the year 1821, a new constitution was adopted which was in force up to the year 1846, when the constitution was again re-modelled, and which is now in force.

This constitution contains a bill of rights; the first sixteen sections of which contain the following provisions:

"No member of this state shall be disfranchised, or deprived of any of the rights or privileges, secured to any citizen thereof, unless by the law of the land, or the judgment of his peers.

"The trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever. But a jury trial may be waived by the parties in all civil cases, in the manner to be prescribed by law.

"The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind; and

no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

"The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require its suspension.

"Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained.

"No person shall be held to answer for a capital or otherwise infamous crime, (except in cases of impeachment, and in cases of the militia, when in actual service; and the land and naval forces in time of war, or which this state may keep with the consent of congress in time of peace; and in cases of petit larceny, under the regulation of the legislature,) unless on presentment or indictment of a grand jury; and in any trial in any court whatsoever, the party accused shall be allowed to appear and defend in person and with counsel, as in civil actions. No person shall be subject to be twice put in jeopardy for the same offence; nor shall he be compelled in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

"When private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the state, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law. Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of

the road, and the amount of all damage to be sustained by the opening thereof, shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefitted.

"Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments, for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libellous is true, and was published with good motives and for justifiable ends, the party shall be acquitted, and the jury shall have the right to determine the law and the fact.

"The assent of two-thirds of the members elected to each branch of the legislature, shall be requisite to every bill appropriating the public moneys or property for local or private purposes.

"No law shall be passed, abridging the right of the people peaceably to assemble, and to petition the government, or any department thereof; nor shall any divorce be granted, otherwise than by due judicial proceedings; nor shall any lottery hereafter be authorized, or any sale of lottery tickets allowed, within this state.

"The people of this state, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the state; and all lands, the title to which shall fail, from a defect of heirs, shall revert or escheat to the people.

"All feudal tenures of every description, with all their incidents, are declared to be abolished; saving, however, all rents and services certain which at any time heretofore have been lawfully created or reserved.

"All lands within this state are declared to be allodial,

so that, subject only to the liability to escheat, the entire and absolute property is vested in the owners according to the nature of their respective estates.

"No lease or grant of agricultural land for a longer period than twelve years, hereafter made, in which shall be reserved any rent or service of any kind, shall be valid.

"All fines, quarter sales, or other like restraints upon alienation reserved, in any grant of land hereafter to be made, shall be void.

"No purchase or contract for the sale of lands in this state, made since the fourteenth day of October, one thousand seven hundred and seventy-five; or which may hereafter be made, of, or with the Indians, shall be valid, unless made under the authority and with the consent of the legislature."

§ 89. By this last constitution, the legislative power is vested in a *Senate* and *Assembly*. The *Senate* consists of thirty-two members, and are chosen every two years. The *Assembly* consists of one hundred and twenty-eight members, annually elected. The former branch is elected from the districts into which the state is divided, each district being entitled to one member. The members of the assembly are apportioned among the several counties, according to the number of its inhabitants. A majority of each house constitutes a quorum, and each house determines the rules of its proceedings, judges the elections, returns and qualifications of its own members, and chooses its own officers, except the president of the senate. Any bill may originate in either house, and all bills passed by one house, may be amended by the other. The enacting clause of all bills is, "The People of the State of New York, represented in Senate and Assembly, do enact as follows." The legislature has power to alter and regulate the proceedings and jurisdiction in law and equity; they may establish local courts of civil

and criminal jurisdiction, and provide for the election of local officers; to provide by law for the registry of bills and notes issued as money; provide for the organization of cities and villages, restrict their power of taxation, assessments, contracting debts, and borrowing money; may provide for filling up vacancies in office, or declaring offices to be vacant; and have such other and further powers as are necessary for the legislature of a free and enlightened people.

No bill can be passed unless by the assent of a majority of all the members elected to each branch of the legislature; and the question upon the final passage must be taken immediately upon its last reading, and the yeas and nays entered on the journal. No private or local bill, which may be passed by the legislature, can embrace more than one subject, and that must be expressed in the title.

The legislature has power to delegate to the board of supervisors of the several counties of the state, such further powers of local legislation and administration, as it shall from time to time prescribe. Every bill which passes the senate and assembly must, before it becomes a law, be presented to the governor: if he approves, he must sign it; but if not, he must return it with his objections, to that house in which it originated, which must enter such objections at large on the journal, and proceed to re-consider it. If, after such re-consideration, two-thirds of the members present shall pass the bill, it must be sent to the other house, by which it must be re-considered; and if approved by all the members present, it becomes a law, notwithstanding the objections of the governor. But in such cases, the vote of both houses must be determined by yeas and nays, and entered on their respective journals. If the bill is not returned by the governor within ten days, Sundays excepted, after it shall be presented to him, it becomes a law in the same

manner as if he had signed it, unless the legislature shall, by their adjournment, prevent its return, in which case it does not become a law.

There is quite an anomaly in the provisions respecting the passage of those bills which the governor returns with his objections. No bill, it will be perceived, can be passed under one provision of the constitution, unless it receive the assent of a majority of all the members elected to each branch of the legislature; the total number of both branches is one hundred and sixty; therefore, eighty-one constitutes a majority that must vote for the bill originally. A majority of each house, by another provision, constitutes a quorum to do business; hence, sixty-five is a majority of the house, and seventeen a majority of the senate; making the total number to constitute a quorum for both houses eighty-two. In the event that all the residue of each branch should see fit to absent themselves from the house on a final passage of a bill vetoed by the governor, two-thirds of sixty-five may pass the bill in the house, and two-thirds of seventeen may pass it, under such circumstances, in the senate: that is, twelve may pass it in the senate, and thirty-three in the house; so that, in the event of a veto to a bill, it may, notwithstanding, become a law by the final vote of forty-five members of the legislature; whereas, if it had not been objected to by the governor, it must, in order to have become a law, have received the vote of at least eighty-one members of the legislature.

The clause relative to those bills returned with the dissent of the governor, is found in a section of the constitution posterior to the other provisions above referred to, in the same instrument.

§ 90. The constitution of Pennsylvania declares, that the legislative powers shall be vested in a General Assembly, consisting of a Senate and House of Representatives.

It also contains the following provisions:

"The general assembly shall meet on the first Tuesday of December in every year, unless sooner convened by the governor.

"Each house shall choose its speaker and other officers; and the senate shall also choose a speaker *pro tempore*, when the speaker shall exercise the office of governor.

"Each house shall judge of the qualifications of its members. Contested elections shall be determined by a committee, to be selected, formed, and regulated in such manner as shall be directed by law. A majority of each house shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized, by law, to compel the attendance of absent members, in such manner, and under such penalties as may be provided.

"Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member, but not a second time for the same cause; and shall have all other powers necessary for a branch of the legislature of a free state.

"Each house shall keep a journal of its proceedings, and publish them weekly, except such parts as may require secrecy. And the yeas and nays of the members on any question shall, at the desire of any two of them, be entered on the journals.

"The doors of each house and of committees of the whole shall be open, unless when the business shall be such as ought to be kept secret.

"Neither house shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

"All bills for raising revenue shall originate in the

house of representatives; but the senate may propose amendments, as in other bills.

"Every bill, which shall have passed both houses, shall be presented to the governor. If he approve, he shall sign it; but if he shall not approve, he shall return it, with his objections, to the house in which it shall have originated, who shall enter the objections at large upon their journals, and proceed to reconsider it. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, with the objections, to the other house, by which likewise it shall be reconsidered; and if approved by two-thirds of that house, it shall be a law. But in such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for or against the bill shall be entered on the journals of each house respectively. If any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him, it shall be a law, in like manner as if he had signed it, unless the general assembly, by their adjournment, prevent its return: in which case it shall be a law, unless sent back within three days after their next meeting.

"Every order, resolution or vote, to which the concurrence of both houses may be necessary, (except on a question of adjournment) shall be presented to the governor, and, before it shall take effect, be approved by him, or being disapproved, shall be repassed by two-thirds of both houses, according to the rules and limitations prescribed in case of a bill.

"The house of representatives shall have the sole power of impeaching.

"All impeachments shall be tried by the Senate: When sitting for that purpose, the senators shall be upon oath or affirmation. No person shall be convicted

without the concurrence of two-thirds of the members present."

It also contains the following declaration of rights:

"That the general, great, and essential principles of liberty and free government may be recognized and unalterably established, WE DECLARE That,

"All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

"All power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety and happiness: For the advancement of these ends, they have at all times, an unalienable and indefeasible right to alter, reform, or abolish their government, in such manner as they may think proper.

"All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences: no man can, of right, be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent: no human authority can, in any case whatever, control or interfere with the rights of conscience: and no preference shall ever be given, by law, to any religious establishment or modes of worship.

"No person who acknowledges the being of a God, and a future state of rewards and punishments, shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this commonwealth.

"Elections shall be free and equal.

"Trial by jury shall be as heretofore, and the right thereof remain inviolate.

"The printing presses shall be free to every person who undertakes to examine the proceedings of the legis-

lature, or any branch of government: And no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. In prosecutions for the publication of papers investigating the official conduct of officers, or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence: And in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court as in other cases.

"The people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures: And no warrant to search any place, or to seize any person or things, shall issue, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

"In all criminal prosecutions, the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial, by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land.

"No person shall, for any indictable offence, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger, or, by leave of the court, for oppression and misdemeanor in office. No person shall for the same offence, be twice put in jeopardy of life or limb; nor shall any man's

property be taken or applied to public use, without the consent of his representatives, and without just compensation being made.

"All courts shall be open, and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by the due course of law, and right and justice administered, without sale, denial or delay. Suits may be brought against the commonwealth in such manner, in such courts, and in such cases, as the legislature may by law direct.

"No power of suspending laws shall be exercised, unless by the legislature, or its authority.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.

"All prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident or presumption great; and the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion, or invasion, the public safety may require it.

"No commission of Oyer and Terminer or gaol delivery shall be issued.

"The person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison, after delivering up his estate for the benefit of his creditors, in such a manner as shall be prescribed by law.

"No *ex post facto law*, nor any law impairing contracts shall be made.

"No person shall be attainted of treason or felony by the legislature.

"No attainder shall work corruption of blood, nor, except during the life of the offender, forfeiture of estate to the commonwealth: the estates of such persons as shall destroy their own lives, shall descend or vest as in case of natural death; and if any person shall be killed

by casualty, there shall be no forfeiture by reason thereof.

"The citizens have a right, in a peaceable manner, to assemble together, for their common good, and to apply to those invested with the powers of government for redress of grievances, or other proper purposes, by petition, address, or remonstrance.

"The right of citizens to bear arms, in defence of themselves and the state, shall not be questioned.

"No standing army shall, in time of peace, be kept up without the consent of the legislature; and the military shall, in all cases, and at all times, be in strict subordination to the civil power.

"No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

"The legislature shall not grant any title of nobility, or hereditary distinction, nor create any office the appointment of which shall be for a longer term than during good behaviour.

"Emigration from the state shall not be prohibited.

"To guard against transgressions of the high powers which we have delegated, WE DECLARE, That every thing in this article is excepted out of the general powers of government, and shall for ever remain inviolate."

§ 91. On the 2d day of July, 1776, in a provincial congress, held at Burlington, New Jersey, a charter of rights, in the form of a constitution, was adopted, which was slightly amended by an act of 20th September, 1777, and remained the fundamental law of that state, until the adoption of a new constitution in 1844. The constitution then adopted contained the following provisions:

"All men are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, ac-

quiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

"All political power is inherent in the people.

"Government is instituted for the protection, security, and benefit of the people, and they have the right at all times to alter or reform the same, whenever the public good may require it.

"No person shall be deprived of the inestimable privilege of worshiping Almighty God in a manner agreeable to the dictates of his own conscience; nor under any pretence whatever, be compelled to attend any place of worship contrary to his faith and judgment; nor shall any person be obliged to pay tithes, taxes, or other rates, for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry contrary to what he believes to be right, or has deliberately and voluntarily engaged to perform.

"There shall be no establishment of one religious sect in preference to another. No religious test shall be required as a qualification for any office or public trust; and no person shall be denied the enjoyment of any civil right merely on account of his religious principles.

"Every person may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libellous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall

issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the papers and things to be seized.

"The right of trial by jury shall remain inviolate; but the legislature may authorize the trial of civil suits, when the matter in dispute does not exceed fifty dollars, by a jury of six men.

"In all criminal prosecutions, the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel in his defence.

"No person shall be held to answer for a criminal offence, unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases cognizable by justices of the peace, or arising in the army or navy, or in the militia, when in actual service in time of war or public danger.

"No person shall, after acquittal, be tried for the same offence. All persons shall, before conviction, be bailable by sufficient sureties, except for capital offences, when the proof is evident or presumption great.

"The privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety may require it.

"The military shall be in strict subordination to the civil power.

"No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, except in a manner prescribed by law.

"Treason against the state shall consist only in levying war against it, or in adhering to its enemies, giving them aid and comfort. No person shall be convicted of

treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.

"Excessive bail shall not be required, excessive fines shall not be imposed, and cruel and unusual punishments shall not be inflicted.

"Private property shall not be taken for public use without just compensation; but land may be taken for public highways as heretofore, until the legislature shall direct compensation to be made.

"No person shall be imprisoned for debt in any action, or on any judgment founded upon contract, unless in cases of fraud; nor shall any person be imprisoned for a militia fine in time of peace.

"The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances.

"This enumeration of rights and privileges shall not be construed to impair or deny others retained by the people."

§ 92. It also provided:

"The powers of the government shall be divided into three distinct departments—the legislative, executive, and judicial; and no person or persons belonging to, or constituting one of these departments, shall exercise any of the powers properly belonging to either of the others, except as herein expressly provided.

"The legislative power shall be vested in a Senate and General Assembly.

"The senate shall be composed of one senator from each county in the state, elected by the legal voters of the counties, respectively, for three years.

"The general assembly shall be composed of members annually elected by the legal voters of the counties, respectively, who shall be apportioned among the said

counties as nearly as may be, according to the number of their inhabitants.

"Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each house may provide.

"Each house shall choose its own officers, determine the rules of its proceedings, punish its members for disorderly behaviour, and, with the concurrence of two-thirds, may expel a member.

"Each house shall keep a journal of its proceedings, and from time to time publish the same; and the yeas and nays of the members of either house, on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

"Neither house, during the session of the legislature, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

"All bills and joint resolutions shall be read three times in each house, before the final passage thereof; and no bill or joint resolution shall pass, unless there be a majority of all the members of each body personally present and agreeing thereto: and the yeas and nays of members voting on such final passage shall be entered on the journal.

"All bills for raising revenue shall originate in the house of assembly; but the senate may propose or concur with amendments, as on other bills.

"No money shall be drawn from the treasury, but for appropriations made by law.

"The credit of the state shall not be directly or indirectly loaned in any case.

"The legislature shall not, in any manner, create any debt or debts, liability or liabilities, of the state, which shall singly, or in the aggregate with any previous debts or liabilities, at any time exceed one hundred thousand dollars, except for purposes of war or to repel invasion, or to suppress insurrection, unless the same shall be authorized by a law for some single object or work, to be distinctly specified therein; which law shall provide the ways and means, exclusive of loans, to pay the interest of such debt or liability as it falls due, and also, to pay and discharge the principal of such debt or liability within thirty-five years from the time of the contracting thereof, and shall be irrepealable until such debt or liability, and the interest thereon, are fully paid and discharged: and no such law shall take effect until it shall, at a general election, have been submitted to the people, and have received the sanction of a majority of all the votes cast for and against it at such election: and all money to be raised by the authority of such law shall be applied only to the specific object stated therein, and to the payment of the debt thereby created. This section shall not be construed to refer to any money that has been, or may be deposited with this state by the government of the United States.

"No divorce shall be granted by the legislature.

"No lottery shall be authorized by this state; and no ticket in any lottery not authorized by a law of this state, shall be bought or sold within the state.

"The legislature shall not pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made.

"To avoid improper influences, which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall

embrace but one object, and that shall be expressed in the title.

"The laws of this state shall begin in the following style, 'Be it enacted by the Senate and General Assembly of the state of New Jersey.'

"The fund for the support of free schools, and all money, stock and other property, which may hereafter be appropriated for that purpose, or received into the treasury under the provision of any law heretofore passed to augment the said fund, shall be securely invested, and remain a perpetual fund; and the income thereof, except so much as it may be judged expedient to apply to an increase of the capital, shall be annually appropriated to the support of public schools, for the equal benefit of all the people of the state; and it shall not be competent for the legislature to borrow, appropriate, or use the said fund, or any part thereof, for any other purpose, under any pretence whatever.

"No private or special law shall be passed authorizing the sale of any lands belonging in whole or in part to a minor or minors, or other persons who may at the time be under any legal disability to act for themselves.

"The assent of three-fifths of the members elected to each house shall be requisite to the passage of every law for granting, continuing, altering, amending, or renewing charters for banks or money corporations; and all such charters shall be limited to a term not exceeding twenty years.

"Individuals or private corporations shall not be authorized to take private property for public use, without just compensation first made to the owners.

"The legislature may vest in the circuit courts or courts of common pleas, within the several counties of this state, chancery powers, so far as relates to the foreclosure of mortgages and sale of mortgaged premises.

"Every bill which shall have passed both houses

shall be presented to the governor: if he approve, he shall sign it; but if not, he shall return it, with his objections, to the house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it; if, after such reconsideration, a majority of the whole number of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved of by a majority of the whole number of that house, it shall become a law; but in neither house shall the vote be taken on the same day on which the bill shall be returned to it: and in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the governor, within five days (Sunday excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the legislature, by their adjournment, prevent its return, in which case it shall not be a law.

"The house of assembly shall have the sole power of impeaching, by a vote of a majority of all the members; and all impeachments shall be tried by the senate: the members, when sitting for that purpose, to be on oath or affirmation 'Truly and impartially to try and determine the charge in question according to evidence:' and no person shall be convicted without the concurrence of two-thirds of all the members of the senate."

§ 93. The constitution of the state of Delaware vests the legislative power in a general assembly, consisting of a Senate and House of Representatives.

The representatives are chosen for two years by the citizens of the respective counties.

The senators are elected for four years in the same manner.

Each house elects its speaker and other officers; and also each house whose speaker acts as governor elects a speaker *pro tem.*

Each house also are judges of the elections, returns, and qualifications of their own members, and a majority constitutes a quorum; they may compel the attendance of their members, determine their own rules of proceedings, punish their own members for disorderly behavior, and has all the powers necessary for a legislature of a free state.

The house of representatives has the sole power of impeachment, but these cases must be tried by the senate. It is also declared:

"All bills for raising revenue shall originate in the house of representatives; but the senate may propose alterations as in other bills; and no bill, from the operations of which, when passed into a law, revenue may incidentally arise, shall be accounted a bill for raising revenue; nor shall any matter or clause whatever, not immediately relating to and necessary for raising revenues be in any manner blended with or annexed to a bill for raising revenue.(*a*)

"No act of incorporation, except for the renewal of existing corporations, shall be hereafter enacted without the concurrence of two thirds of each branch of the legislature, and with a reserved power of revocation by the legislature; and no act of incorporation which may be hereafter enacted shall continue in force for a longer period than twenty years, without the re-enactment of the legislature, unless it be an incorporation for public improvement."

§ 94. The constitution of Maryland contains the following declaration of rights:

"The parliament of Great Britain, by a declaratory

(*a*) Art. 2, § 14.

act, having assumed a right to make laws to bind the colonies in all cases whatsoever, and, in pursuance of such claim, endeavored, by force of arms, to subjugate the united colonies to an unconditional submission to their will and power, and having at length constrained them to declare themselves independent states, and to assume a government under the authority of the people: Therefore,

"We, the delegates of Maryland, in free and full convention assembled, taking into our most serious consideration the best means of establishing a good constitution in this state, for the sure foundation and more permanent security thereof, declare:

"That all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole.

"That the people of this state ought to have the sole and exclusive right of regulating the internal government and police thereof.

"That the inhabitants of Maryland are entitled to the common law of England, and the trial by jury, according to the course of that law, and to the benefit of such of the English statutes, as existed at the time of their first emigration; and which, by experience, have been found applicable to their local and other circumstances, and of such others as have been since made in England, and Great Britain, and have been introduced, used, and practised by the courts of law or equity: and also to all acts of assembly, in force on the first of June, seventeen hundred and seventy-four, except such as may have since expired, or have been, or may be, altered by acts of convention, or this declaration of rights—subject, nevertheless, to the revision of, and amendment or repeal by, the legislature of this state; and the inhabitants of Maryland are also entitled to all property derived to

them from or under the charter granted by his majesty Charles I., to Cæcilius Calvert, Baron of Baltimore.

"That all persons invested with the legislative or executive powers of government are the trustees of the public, and, as such, accountable for their conduct; wherefore, whenever the ends of government are perverted, and the public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to do, reform the old, or establish a new government. The doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind.

"That the right, in the people, to participate in the legislature, is the best security of liberty, and the foundation of all free government; for this purpose elections ought to be free and frequent, and every man having property in, a common interest with, and an attachment to, the community, ought to have a right of suffrage.

"That the legislative, executive, and judicial powers of government ought to be for ever separate and distinct from each other.

"That no power of suspending laws, or the execution of laws, unless by, or derived from, the legislature, ought to be exercised or allowed.

"That freedom of speech and debate, or proceedings, in the legislature, ought not be impeached in any other court of judicature.

"That a place for the meeting of the legislature ought to be fixed, the most convenient to the members thereof, and to the depository of public records; and the legislature ought not to be convened or held at any other place, but from evident necessity.

"That, for redress of grievances, and for amending, strengthening, and preserving the laws, the legislature ought to be frequently convened.

"That every man hath a right to petition the legisla-

ture, for the redress of grievances, in a peaceable and orderly manner.

"That no aid, charge, tax, burthen, fee or fees, ought to be set, rated, or levied, under any pretence, without consent of the legislature.

"That the levying of taxes by the poll is grievous and oppressive, and ought to be abolished; that paupers ought not to be assessed for the support of government; but every other person in the state ought to contribute his proportion of public taxes, for the support of government, according to his actual worth, in real or personal property, within the state; yet fines, duties, or taxes may properly and justly be imposed or laid, with political view, for the good government and benefit of the community.

"That sanguinary laws ought to be avoided, as far as is consistent with the safety of the state; and no law to inflict cruel and unusual pains and penalties ought to be made in any case, or at any time hereafter.

"That retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore, no *ex post facto* law ought to be made.

"That no law to attaint particular persons of treason or felony, ought to be made in any case, or any time hereafter.

"That every freeman, for any injury done him in his person or property, ought to have remedy, by the course of the law of the land, and ought to have justice and right, freely, without sale, fully, without any denial, and speedily, without delay, according to the law of the land.

"That the trial of facts where they arise is one of the greatest securities of the lives, liberties, and estates of the people.

"That, in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the indictment or charge in due time (if required) to prepare for his defence; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him, on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.

"That no man ought to be compelled to give evidence against himself, in a court of common law, or in any other court, but in such cases as have been usually practised in this state, or may hereafter be directed by the legislature.

"That no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land.

"That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted by the courts of law.

"That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place or the person in special, are illegal, and ought not to be granted.

"That there ought to be no forfeiture of any part of the estate of any person, for any crime except murder, or treason against the state, and then only on conviction and attainder.

"That a well regulated militia is the proper and natural defence of a free government.

"That standing armies are dangerous to liberty, and

ought not to be raised or kept up without consent of the legislature.

"That, in all cases and at all times, the military ought to be under strict subordination to, and control of, the civil power.

"That no soldier ought to be quartered in any house in time of peace, without the consent of the owner; and in time of war, in such manner only as the legislature shall direct.

"That no person, except regular soldiers, mariners, and marines in the service of this state, or militia when in actual service, ought in any case to be subject to, or punishable by, martial law.

"That the independency and uprightness of judges are essential to the impartial administration of justice, and a great security to the rights and liberties of the people; wherefore, the chancellor and judges ought to hold commissions during good behaviour; and the said chancellor and judges shall be removed for misbehaviour, on conviction in a court of law, and may be removed by the governor, upon the address of the general assembly; provided, that two-thirds of all the members of each house concur in such address. That salaries, liberal, but not profuse, ought to be secured to the chancellor and the judges during the continuance of their commissions, in such manner, and at such times, as the legislature shall hereafter direct, upon consideration of the circumstances of this state. No chancellor or judge ought to hold any other office, civil or military, or receive fees or perquisites of any kind.

"That a long continuance in the first executive department of power or trust, is dangerous to liberty; a rotation, therefore, in those departments, is one of the best securities of permanent freedom.

"That no person ought to hold, at the same time, more than one office of profit, nor ought any person in

public trust to receive any present from any foreign prince or state, or from the United States, or any of them, without the approbation of this state.

"That, as it is the duty of every man to worship God in such manner as he thinks most acceptable to him, all persons professing the Christian religion are equally entitled to protection in their religious liberty; wherefore, no person ought by any law to be molested in his person or estate, on account of his religious persuasion or profession, or for his religious practice; unless, under color of religion, any man shall disturb the good order, peace, or safety of the state, or shall infringe the laws of morality, or injure others in their natural, civil, or religious rights: nor ought any person to be compelled to frequent, or maintain, or contribute, unless on contract, to maintain any particular place of worship or any particular ministry; (yet the legislature may, in their discretion, lay a general and equal tax for the support of the Christian religion; leaving to each individual the power of appointing the payment over of the money, collected from him, to the support of any particular place of worship or minister, or for the benefit of the poor of his own denomination, or the poor in general of any particular county;) but the churches, chapels, glebes, and all other property, now belonging to the church of England, ought to remain to the church of England forever. And all acts of assembly lately passed, for collecting moneys for building or repairing particular churches or chapels of ease, shall continue in force, and be executed, unless the legislature shall, by act, supersede or repeal the same: but no county court shall assess any quantity of tobacco, or sum of money, hereafter, on the application of any vestry-men or church-wardens; and every incumbent of the church of England, who hath remained in his parish, and performed his duty, shall be entitled to receive the provision and support established by the act entitled

"an act for the support of the clergy of the church of England in this province," till the November court of this present year, to be held for the county in which his parish shall lie, or partly lie, or for such time as he hath remained in his parish, and performed his duty.

"That every gift, sale, or devise of lands, to any minister, public teacher, or preacher of the gospel, as such, or to any religious sect, order, or denomination, or to or for the support, use, or benefit of, or in trust for, any minister, public teacher, or preacher of the gospel, as such, or any religious sect, order, or denomination; and every gift or sale of goods or chattels, to go in succession, or to take place after the death of the seller, or donor, to or for such support, use, or benefit, and also every devise of goods or chattels to or for the support, use, or benefit of any minister, public teacher, or preacher of the gospel, as such, or any religious sect, order, or denomination, without the leave of the legislature, shall be void, except always any sale, gift, lease, or devise of any quantity of land not exceeding two acres, for a church, meeting, or other house of worship, and for a burying ground, which shall be improved, enjoyed, or used only for such purpose, or such sale, gift, lease, or devise, shall be void.

"That no other test or qualification ought to be required, on admission to any office of trust or profit, than such oath of support and fidelity to this state, and such oath of office, as shall be directed by this convention or the legislature of this state, and a declaration of a belief in the Christian religion.

"That the manner of administering an oath to any person, ought to be such as those of the religious persuasion, profession, or denomination, of which such person is one, generally esteem the most effectual confirmation by the attestation of the divine Being; and that the people called Quakers, those called Tunkers, and those called Menonists, holding it unlawful to take an

oath on any occasion, ought to be allowed to make their solemn affirmation in the manner that Quakers have been heretofore allowed to affirm; and to be of the same avail as an oath in all such cases as the affirmation of Quakers hath been allowed and accepted within this state instead of an oath. And further, on such affirmation, warrants to search for stolen goods, or the apprehension or commitment of offenders, ought to be granted, or security for the peace awarded, and Quakers, Tunkers, or Menonists ought also, on their solemn affirmation aforesaid, to be admitted as witnesses in all criminal cases, (not capital.)

"That the city of Annapolis ought to have all its rights, privileges, and benefits, agreeable to its charter and the acts of assembly confirming and regulating the same, subject, nevertheless, to such alterations as may be made by this convention or any future legislature.

"That the liberty of the press ought to be inviolably preserved.

"That monopolies are odious, contrary to the spirit of a free government, and the principles of commerce, and ought not to be suffered.

"That no title of nobility, or hereditary honors, ought to be granted in this state.

"That the subsisting resolves of this and the several conventions held for this colony, ought to be in force as laws, unless altered by this convention, or the legislature of this state.

"That this declaration of rights, or the form of government to be established by this convention, or any part of either of them, ought not to be altered, changed, or abolished by the legislature of this state, but in such manner as this convention shall prescribe and direct."

§ 95. The constitution of Maryland ordains and fixes the legislative power in two distinct branches, a Senate and a House of Delegates, called together "The General

Assembly of Maryland." The delegates are chosen *viva voce* by the people. They are the judges of the returns, elections and qualifications, of their own members, elect their own officers, originate all money bills, propose bills to the senate, inquire on the oath of witnesses into all complaints, grievances and offences, as the grand inquest of the state, and may commit any person for any crime to the public jail, there to remain till he be discharged by due course of law; may expel any member for misdemeanors, pass and examine all accounts of the state relating to revenue; may call for public and official papers and records, and send for persons whom they may deem necessary in the course of their inquiries. The house of delegates may punish by imprisonment any person for contempt or disorderly conduct towards their members, or by arresting and assaulting them, and the senate exercises the same power.

The Senate is elected every fifth year by the people *viva voce*, in the same manner as the house of delegates, and exercises the same power over their members and officers as the house. They have full power to exercise their judgment in passing laws, and may amend any bill from the house, before passing upon it; they may originate any other except money bills. The style of the laws is, "Be it enacted by the General Assembly of Maryland." Every bill passed by the general assembly when engrossed, must be presented by the speaker of the house of delegates, in the senate, to the governor for the time being, who must sign the same, and thereto affix the great seal in the presence of the members of both houses; and must be recorded in the general court office of the western shore, and in due time printed, published, and certified, under the great seal, to the several county courts.

It is declared, "That it shall not be lawful for the general assembly of this state to lay an equal and

general tax, or any other tax on the people of this state, for the support of any religion."(*a*)

§ 96. On the 12th June, 1776, the representatives of the people of Virginia, assembled in convention, adopted a bill of rights, as follows:

"That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

"That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

"That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community: of all the various modes and forms of government, that is best, which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and that, when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.

"That no man or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which not being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary.

(*a*) Sect. 13, Art. 1, of amendments.

"That the legislative and executive powers of the state should be separate and distinct from the judiciary; and that the members of the two first may be restrained from oppression, by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part of the former members, to be again eligible, or ineligible as the laws shall direct.

"That elections of members to serve as representatives of the people, in assembly, ought to be free; and that all men having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for public uses, without their own consent, or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented, for the public good.

"That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.

"That, in all capital or criminal prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land, or the judgment of his peers.

"That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

"That general warrants, whereby an officer or mes-

senger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

"That, in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred.

"That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.

"That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.

"That the people have a right to uniform government; and, therefore, that no government separate from, or independent of, the government of *Virginia*, ought to be erected or established within the limits thereof.

"That no free government, or the blessing of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.

"That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity towards each other."

By Article 1st of the amended constitution of this state, adopted 14th January, 1830, it is declared, "The declaration of rights made on the 12th June, 1776, by

the representatives of the good people of Virginia, assembled in full and free convention, which pertained to them and their posterity, as the basis and foundation of government; requiring in the opinion of this convention no amendment, shall be prefixed to this constitution, and have the same relation thereto as it had to the former constitution of this commonwealth."

§ 97. In the state of VIRGINIA, the legislative power, by the constitution of that state, is vested in two distinct branches, called together the General Assembly of Virginia. One of these branches is called the house of delegates, and consists of one hundred and thirty-four members, chosen annually by the several counties. The other branch is the senate, consisting of thirty-two members, chosen by districts. Each house appoints its own officers, and judges the elections of its own members. They have power to divest all persons, civil, military, executive or otherwise, from all power, office, or emolument from the state, who have fought a duel or been engaged in a duel in any manner. All cases of impeachments arise in the house of delegates, but are tried by the senate.

The legislature is required to meet at least once every year; and neither house during the session, without the consent of the other, can adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting. A majority of each house constitutes a quorum, but a smaller number may adjourn from day to day. All laws must originate in the house of delegates, to be approved or rejected by the senate, or to be amended with the consent of the house of delegates.

Sec. 11 of art. 3, contains a limitation upon legislative power. It declares, "The privilege of the writ of habeas corpus shall not in any case be suspended. The legislature shall not pass any bill of attainder; or any *ex post*

facto law; or any law impairing the obligation of contracts; or any law, whereby private property shall be taken for public uses, without just compensation; or any law abridging the freedom of speech, or of the press. No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever; nor shall any man be enforced, restrained, molested, or burthened in his body or goods, or otherwise suffer, on account of his religious opinions or belief, but all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and the same shall in no wise affect, diminish, or enlarge their civil capacities. and the legislature shall not prescribe any religious test whatever; nor confer any peculiar privileges or advantages on any one sect or denomination; nor pass any law requiring or authorizing any religious society, or the people of any district within this commonwealth to levy on themselves or others any tax for the erection or repair of any house for public worship, or for the support of any church or ministry; but it shall be left free to every person to select his religious instructor, and make for his support such private contract as he shall please."

§ 98. The declaration of rights of North Carolina, adopted on 18th December, 1776, provided:

"That all political power is vested in, and derived from, the people only.

"That the people of this state ought to have the sole and exclusive right of regulating the internal government and police thereof.

"That no men, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services.

"That the legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other.

"That all powers of suspending laws, or the execution

of laws, by any authority, without the consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.

"That elections of members to serve as representatives in general assembly ought to be free.

"That in all criminal prosecutions, every man has a right to be informed of the accusation against him, and to confront the accusers and witnesses with other testimony, and shall not be compelled to give evidence against himself.

"That no freeman shall be put to answer any criminal charge, but by indictment, presentment or impeachment.

"That no freeman shall be convicted of any crime, but by the unanimous verdict of a jury of good and lawful men, in open court, as heretofore used.

"That excessive bail should not be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted.

"That general warrants, whereby any officer or messenger may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons, not named, whose offences are not particularly described, and supported by evidence, are dangerous to liberty, and ought not to be granted.

"That no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land.

"That every freeman restrained of his liberty is entitled to a remedy, to inquire into the lawfulness thereof, and to remove the same, if unlawful; and that such remedy ought not to be denied or delayed.

"That in all controversies at law, respecting property, the ancient mode of trial by jury is one of the best secu-

rities of the rights of the people, and ought to remain sacred and inviolable.

"That the freedom of the press is one of the great bulwarks of liberty; and therefore ought never to be restrained.

"That the people of this state ought not to be taxed, or made subject to the payment of any impost, or duty, without the consent of themselves, or their representatives in general assembly freely given.

"That the people have a right to bear arms, for the defence of the state; and as standing armies, in time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power.

"That the people have a right to assemble together, to consult for the common good, to instruct their representatives, and to apply to the legislature for redress of grievances.

"That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own conscience.

"That, for redress of grievances, and for amending and strengthening the laws, elections ought to be often held.

"That a frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty.

"That no hereditary emoluments, privileges, or honors ought to be granted or conferred in this state.

"That perpetuities and monopolies are contrary to the genius of a free state, and ought not to be allowed.

"That retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore, no *ex post facto* law ought to be made."

Section thirty-four of the constitution provides:

"That there shall be no establishment of any one religious church or denomination in this state, in preference to any other; neither shall any person, on any pretence whatsoever, be compelled to attend any place of worship contrary to his own faith or judgment, nor be obliged to pay for the purchase of any glebe, or the building of any house of worship, or for the maintenance of any minister or ministry, contrary to what he believes right, or has voluntarily and personally engaged to perform; but all persons shall be at liberty to exercise their own mode of worship. Provided, that nothing herein contained shall be construed to exempt preachers of treasonable or seditious discourses, from legal trial and punishment."

Sec. 4 of the amendments to the constitution, made June 4, 1835, and ratified by the people 9th November, 1835, and which took effect January 1, 1836, contains the following restrictions upon the legislature:

"The general assmbly shall have power to pass general laws regulating divorce and alimony, but shall not have power to grant a divorce or secure alimony in any individual case.

"The general assembly shall not have power to pass any private law, to alter the name of any person, or to legitimate any persons not born in lawful wedlock, or to restore to the rights of citizenship any person convicted of an infamous crime; but shall have power to pass general laws regulating the same.

"The general assembly shall not pass any private law, unless it shall be made to appear that thirty days' notice of application to pass such law shall have been given, under such directions and in such manner as shall be provided by law."

§ 99. The constitution of North Carolina, as adopted in 1776 and amended in 1836, provides that the legislative authority is vested in two distinct branches, a Senate

and House of Commons, the former composed of fifty representatives, chosen biennially by ballot, and elected by districts; the house of commons consists of one hundred and twenty representatives, biennially chosen by ballot, and denominated together the General Assembly. Each house choose their own officers, judge the elections, &c., of their members, prepare bills to be passed into laws, and appoint judges of the courts of law and equity, judges of admiralty, and attorney general, and all field and general officers of the militia and of the regular army. The general assembly has power to pass laws regulating militia officers, and general laws in divorce and alimony, but not as pertains to individuals."

All bills must be read three times in each house before passed into laws, and be signed by the speaker of each house.

§ 100. By the Constitution of South Carolina the legislative authority of that state is vested in a General Assembly, which consists of a Senate and House of Representatives.

The house of representatives is composed of members chosen by ballot biennially, by the citizens of the state; and the members are proportioned among the several counties.

The senate is chosen for four years, and consists of members elected by the counties of the state, as they are proportioned.

Each house judges of the elections, returns, &c., of their members, and a majority constitutes a quorum; they choose their own officers, determine their rules of proceeding, and punish their members for misconduct, by imprisonment or fine; and also may punish in like manner, any person not a member, for assaulting, arrest ing, or otherwise disturbing the peace, towards a member of the assembly. Bills for raising revenue originate

in the house of representatives, but may be altered, amended or rejected, by the senate. All other bills originate in either house. The house of representatives have the sole power of impeachment, but to be tried by the senate.

No bill or ordinance can have the force of law, until it shall have been read three times, and on three several days in each house, and has the great seal affixed to it, and been signed in the senate by the president, and by the speaker of the house of representatives. Neither house can, during its session, adjourn without the consent of the other for more than three days; nor to any other place than that in which the two houses are sitting. No bill or ordinance which shall have been rejected by either house, can be brought in again during the sitting without leave of the house, and notice of six days being previously given.

Articles 8 and 9 contain the following provisions:

"The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall, forever hereafter, be allowed within this state to all mankind: provided, that the liberty of conscience thereby declared, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

"The rights, privileges, immunities, and estates of both civil and religious societies and of corporated bodies, shall remain as if the constitution of this state had not been altered or amended.

"All power is originally vested in the people; and all free governments are founded on their authority, and are instituted for their peace, safety, and happiness.

"No freeman of this state shall be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the

judgment of his peers, or by the law of the land: nor shall any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, ever be passed by the legislature of this state.

"The military shall be subordinate to the civil power.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.

"The legislature shall not grant any title of nobility or hereditary distinction, nor create any office, the appointment to which shall be for any longer time than during good behavior.

"The trial by jury, as heretofore used in this state, and the liberty of the press, shall be forever inviolably preserved."

§ 101. The legislative power of Georgia is vested in two separate and distinct branches, a Senate and House of Representatives, and are styled "The General Assembly."

The senate is elected annually, and is composed of one member from each county, elected by ballot. They elect their own officers, and have the sole power to try all impeachments.

The house of representatives is composed of members from all the counties, according to their inhabitants by enumeration.

They choose their own officers, and have the sole power of impeachment.

Each house judges of the elections &c. of its own members, has power to expel or punish them by fine or imprisonment, for misdemeanors. All revenue bills originate in the house, and are passed upon by the senate.

The general assembly has power to make all laws and ordinances, not repugnant to the constitution, for the welfare of the state, to alter boundaries of counties, and lay out new ones.

All bills for raising revenue, must originate in the

house of representatives, with power in the senate to propose or concur in amendments. Each bill is required to be read three times on three separate days, in each branch of the general assembly, before it can pass, unless in cases of actual invasion or insurrection. No law or ordinance can pass containing any matter different from what is expressed in the title thereof; and all must be signed by the president in the senate and speaker in the house of representatives. No bill or ordinance which has been rejected by either house, can be brought in again during the same session under the same, or any other title, without the consent of two-thirds of each branch.

Neither house can adjourn for more than three days, without the consent of the other, nor to any other place than that at which the two branches are sitting; and in case of disagreement of the two houses relative to an adjournment, the governor may adjourn them.

Section 22 of Article I. declares, "The general assembly shall have power to make all laws and ordinances which they shall deem necessary and proper for the good of the state, which shall not be repugnant to this constitution."

By section 24, no vote, resolution, law, or order, shall pass the general assembly, granting a donation or gratuity, in favor of any person whatever, but by concurrence of two-thirds of the general assembly.

The governor has the revision of all bills passed by both houses, before the same can become a law. But two-thirds of both houses may pass a law notwithstanding his dissent, and if any bill is not returned by the governor within five days after it is presented to him, the same becomes a law, unless the legislature, by adjournment, prevent a return; and the same rule obtains in reference to every vote, resolution, or order, in

which the concurrence of both houses shall be necessary, except on a question of adjournment.

Freedom of the press, and trial by jury, as theretofore used, it is declared shall remain inviolate. It is also provided, that no *ex post facto* law shall be passed: no person who theretofore hath been, or thereafter may be, a collector, or holder of public moneys, shall be eligible to any office in the state, until such person shall have accounted for, and paid into the treasury, all sums for which he may be accountable or liable. The person of a debtor, where there is not a strong presumption of fraud, shall not be detained in prison after delivering up *bona fide* all his estate, real and personal, for the use of his creditors, in such manner as shall thereafter be regulated by law. The writ of *habeas corpus* shall not be suspended, unless when in case of rebellion or invasion, the public safety may require it. No person within the state shall, upon any pretence, be deprived of the privilege of worshipping God in a manner agreeable to his own conscience, nor be compelled to attend any place of worship contrary to his own faith and judgment: nor shall he ever be obliged to pay tithes, taxes, or any other rate, for the building or repairing any place of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or hath voluntarily engaged to do. No one religious society shall ever be established in this state, in preference to any other; nor shall any person be denied the enjoyment of any civil right, merely on account of his religious principles. There shall be no future importation of slaves into this state, from Africa or any foreign place, after the first day of October next. The legislature shall have no power to pass laws for the emancipation of slaves, without the consent of each of their respective owners, previous to such emancipation. They shall have no power to prevent emigrants, from either of the United States to this

state, from bringing with them such persons as may be deemed slaves by the laws of any one of the United States.

§ 102. The powers of the legislative department of the state of Kentucky are vested in two branches, a House of Representatives and a Senate, and together are styled "The General Assembly of the commonwealth of Kentucky."

The house of representatives is composed of members chosen annually by electors.

They choose their officers, and originate all bills of revenue.

The senate is chosen for four years, and elect their own officers—consists of twenty-four members at least; and for every three members, over fifty-eight, added to the house, one member is added to the senate.

Each house judges the elections, &c., of its own members, and punishes them for misdemeanors.

The house of representatives has the sole power of impeachment, but those cases are tried by the senate.

The general assembly has power to regulate by law the duties, offices, and salaries of public officers, and in what manner suits may be brought against the commonwealth: they have full power to permit owners of slaves to emancipate them, to prevent the importation of slaves, to oblige owners to treat them with humanity, and provide for them the necessaries of life, and keep them comfortable, and to abstain from injuring them in life or limb.

Not less than a majority of the members of each house constitutes a quorum; but a smaller number may adjourn from day to day. Neither house during the session can, without the consent of the other, adjourn for more than three days, nor to any other place than that in which they are sitting. No bill has the force of a law, until on three several days, it be read over in each house; and free discussion allowed thereon; unless, in

cases of urgency, four-fifths of the house, where the bill shall be depending, may deem it expedient to dispense with this rule. All bills for raising revenue must originate in the house of representatives; but the senate may propose amendments as in other bills: *Provided*, they do not introduce any new matter, under the color of an amendment, which does not relate to raising a revenue.

Every bill which shall have passed both houses, must be presented to the governor, which, if he approves, he must sign it; but if not, he must return it, with his objections, to the house in which it shall have originated, which is required to enter his objections at large upon the journal, and proceed to reconsider it; and if, after such reconsideration, a majority of all the members elected to that house shall agree to pass it, it must be sent, with the objections, to the other house, by which it must be likewise considered; and, if approved by a majority of all the members of that house, it becomes a law. The vote in such cases, must be by yeas and nays, and the names of those voting for or against it, entered on the journal. If the governor does not return the bill in ten days after being presented to him, it becomes a law, unless the general assembly adjourn; and in that event, it becomes a law, unless returned within three days after the next meeting of the general assembly. Every order, resolution, or vote, to which the concurrence of both houses is necessary, except on a question of adjournment, must be also presented to the governor, and before it can take effect, must be approved by him; or, if it is disapproved by him, it must be passed by a majority of all the members elected to both houses, according to the rules and limitations prescribed in cases of bills.

Article X. declares:

"That the general, great, and essential principles of

liberty and free government may be recognized and established, we declare:

"That all free men, when they form a social compact, are equal; and that no man or set of men are entitled to exclusive, separate, public emoluments or privileges, from the community, but in consideration of public services.

"That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness: For the advancement of these ends, they have at all times an unalienable and indefeasible right to alter, reform, or abolish their government, in such manner as they may think proper.

"That all men have a natural and indefeasible right to worship Almighty God, according to the dictates of their own consciences; that no man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; that no human authority ought, in any case whatever, to control or interfere with the rights of conscience; and that no preference shall ever be given by law to any religious societies or modes of worship.

"That the civil rights, privileges, or capacities of any citizen, shall in no wise be diminished or enlarged on account of his religion.

"That all elections shall be free and equal.

"That the ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate.

"That printing presses shall be free to every person who undertakes to examine the proceedings of the legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print, on any subject, being responsible for the abuse of that liberty.

"In prosecutions for the publication of papers investigating the official conduct of officers, or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases.

"That the people shall be secure in their persons, houses, papers, and possessions, from unreasonable seizures and searches; and that no warrant to search any place, or to seize any person or thing, shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation.

"That in all criminal prosecutions, the accused hath a right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process for obtaining witnesses in his favor; and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; that he cannot be compelled to give evidence against himself; nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land.

"That no person shall, for any indictable offence, be proceeded against criminally by information, except in cases arising in the land or naval forces, or the militia, when in actual service, in time of war or public danger, by leave of the court, for oppression or misdemeanor in office.

"No person shall, for the same offence, be twice put in jeopardy of his life or limb, nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him.

"That all courts shall be open, and every person for

an injury done him in his lands, goods, person, or reputation, shall have remedy by the due course of law; and right and justice administered without sale, denial, or delay.

"That no power of suspending laws shall be exercised unless by the legislature, or its authority.

"That excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.

"That all prisoners shall be bailable by sufficient securities, unless for capital offences, when the proof is evident, or presumption great: and the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it.

"That the person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison, after delivering up his estate for the benefit of his creditors, in such manner as shall be prescribed by law.

"That no *ex post facto* law, nor any law impairing contracts shall be made.

"That no person shall be attainted of treason or felony by the legislature.

"That no attainder shall work corruption of blood, nor, except during the life of the offender, forfeiture of estate to the commonwealth.

"That the estates of such persons as shall destroy their own lives, shall descend or vest as in case of natural death; and if any person shall be killed by casualty, there shall be no forfeiture by reason thereof.

"That the citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances, or other proper purposes, by petition, address, or remonstrance.

"That the rights of the citizens to bear arms in de-

fence of themselves and the state, shall not be questioned.

"That no standing army shall, in time of peace, be kept up without the consent of the legislature; and the military shall, in all cases and at all times, be in strict subordination to the civil power.

"That no soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

"That the legislature shall not grant any title of nobility or hereditary distinction, nor create any office, the appointment to which shall be for a longer term than during good behavior.

"That emigration from this state shall not be prohibited.

"To guard against transgressions of the high powers which we have delegated, we declare, that every thing in this article is excepted out of the general powers of government, and shall forever remain inviolate; and that all laws contrary thereto, or contrary to this constitution, shall be void."

§ 103. The legislative authority of Tennessee is vested in a General Assembly, consisting of a Senate and a House of Representatives.

The house of representatives consists of members apportioned among the several counties, and are elected biennially.

The senate consists of members apportioned and elected in like manner.

Each house is the judge of the elections and returns of its own members, choose its officers, punish or expel its members for disorderly behavior, and issue writs of elections to fill up vacancies. Bills may originate in either house, and be altered, rejected, or amended by the other.

The style of the laws are, "Be it enacted by the General Assembly of the State of Tennessee."

The general assembly have power to tax all taxable lands in a uniform manner, and to authorize and incorporate towns and counties and impose taxes for county and corporation purposes respectively. They may pass laws excluding the right of suffrage for infamous crimes.

The house of representatives have the sole power of impeachment, but all cases are tried by the senate.

The legislature have the power to repeal, amend, or alter any existing law, and fix the rate of interest.

It is expressly provided that the legislature shall have no power to grant divorces, but may authorize the courts of justice to grant them for such causes as shall be specified by law. Provided such laws be general and uniform in their operation throughout the state. It shall have no power to authorize lotteries for any purpose, and is required to pass laws to prohibit the sale of lottery tickets in the state. It has no power to suspend any general law for the benefit of any particular individual inconsistent with the general law of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunities, or exemptions, other than such as may be by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law. But that the legislature have power to grant such charters of corporations as they may deem expedient for the public good.(*a*)

The constitution of this state also contains the following declaration of rights.

"That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; for the ad-

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(*a*) Art. 2.

vancement of those ends, they have, at all times, an unalienable and indefeasible right to alter, reform or abolish the government in such manner as they may think proper.

"That government being instituted for the common benefit, the docrine of non-resistance against arbitrary power and oppression, is absurd, slavish and destructive to the good and happiness of mankind.

"That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can, of right, be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship.

"That no religious test shall ever be required as a qualification to any office or public trust under this state.

"That elections shall be free and equal.

"That the right of trial by jury shall remain inviolate.

"That the people shall be secure in their persons, houses, papers, and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty, and ought not to be granted.

"That no free man shall be taken or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers, or the law of the land.

"That in all criminal prosecutions, the accused hath

a right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face; to have compulsory process for obtaining witnesses in his favor; and in prosecutions by indictment or presentment, a speedy public trial, by an impartial jury of the county or district in which the crime shall have been committed; and shall not be compelled to give evidence against himself.

"That no person shall, for the same offence, be twice put in jeopardy of life or limb.

"That laws made for the punishment of facts committed previous to the existence of such laws, and by them only declared criminal, are contrary to the principles of a free government; wherefore no *ex post facto* law shall be made.

"That no conviction shall work corruption of blood or forfeiture of estate. The estate of such persons as shall destroy their own lives shall descend or vest as in case of natural death. If any person be killed by casualty, there shall be no forfeiture in consequence thereof.

"That no person arrested or confined in jail, shall be treated with unnecessary rigor.

"That no freeman shall be put to answer any criminal charge but by presentment, indictment, or impeachment.

"That all prisoners shall be bailable by sufficient sureties, except for capital offences when the proof is evident or the presumption great. And the privilege of the writ of *habeas corpus* shall not be suspended, unless when in case of rebellion or invasion the public safety may require it.

"That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

"That all courts shall be open; and every man for an injury done him in his lands, goods, person, or repu-

tation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the state in such manner, and in such courts, as the legislature may by law direct.

"That the person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of his creditor or creditors, in such manner as shall be prescribed by law.

"That the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or of any branch or officer of government; and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. But in prosecutions for the publication of papers investigating the official conduct of officers or men in public capacity, the truth thereof may be given in evidence; and in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other criminal cases.

"That no retrospective law, or law impairing the obligation of contracts, shall be made.

"That no man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor.

"That perpetuities and monopolies are contrary to the genius of a free state, and shall not be allowed.

"That the citizens have a right, in a peaceable manner, to assemble together, for their common good, to instruct their representatives, and to apply to those invested with the powers of government for redress of

grievances or other proper purposes, by address or remonstrance.

"That the sure and certain defence of a free people is a well regulated militia: and, as standing armies in time of peace are dangerous to freedom, they ought to be avoided, as far as the circumstances and safety of the community will admit; and that in all cases the military shall be kept in strict subordination to the civil authority.

"That no citizen of this state, except such as are employed in the army of the United States, or militia in actual service, shall be subjected to corporeal punishment under the martial law.

"That the free white men of this state have a right to keep and to bear arms for their common defence.

"That no soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner prescribed by law.

"That no citizen of this state shall be compelled to bear arms, provided he will pay an equivalent, to be ascertained by law.

"That an equal participation of the free navigation of the Mississippi, is one of the inherent rights of the citizens of this state: it cannot, therefore, be conceded to any prince, potentate, power, person or persons whatever.

"That no hereditary emoluments, privileges, or honors shall ever be granted or conferred in this state."

§ 104. The legislative authority of the state of Ohio is vested in a *General Assembly*, consisting of a *Senate* and a *House of Representatives*.

The REPRESENTATIVES are chosen annually by the citizens of each county respectively, and the number never is less than thirty-six, nor exceeds seventy-two.

The SENATORS are elected biennially, by qualified voters for representatives; and are divided by lot into two

classes. They are limited to not less than one-third nor to more than one-half of the number of representatives. Each house keeps a journal of its proceedings, elects its own officers, determines its own rules of proceeding, punishes its members for disorderly behavior, and expels a member with a two-third vote. They may issue writs of election to fill vacancies when they occur in their bodies. They are privileged from arrest except in cases of treason, felony, or breach of the peace; they may punish any person for disorderly conduct or disrespect towards the house, by imprisonment, not to exceed twenty-four hours. Bills may originate in either house, but may be altered, amended, or rejected by the other. The style of the laws are, "Be it enacted by the General Assembly of the state of Ohio."

The representatives have the sole power of impeachment, to be tried by the senate. All bills are signed by the speakers of both houses.

Every bill must be read on three different days in each house, unless in case of emergency three fourths of the house where the bill is so pending shall deem it expedient to dispense with this rule. And every bill having passed both houses, must be signed by the speakers of the respective houses.

Article 8 declares:

"That the general, great, and essential principles of liberty and free government may be recognized, and for ever unalterably established, we declare,

"That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety; and every free republican government, being founded on their sole authority, and organized for the purpose of protecting their liberties, and securing their independence—to

effect these ends they have at all times a complete power to alter, reform, or abolish their government, whenever they may deem it necessary.

"There shall be neither slavery nor involuntary servitude in this state, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted; nor shall any male person, arrived at the age of twenty-one years, nor female person, arrived at the age of eighteen years, be held to serve any person as a servant under pretence of indenture, or otherwise, unless such person shall enter into such indenture while in a state of perfect freedom, and on condition of a bona fide consideration, received or to be received for their service, except as before excepted. Nor shall any indenture of any negro or mulatto hereafter made and executed, out of this state, or, if made in the state, where the term of service exceeds one year, be of the least validity, except those given in the case of apprenticeships.

"That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no human authority can in any case whatever control or interfere with the rights of conscience; that no man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent; and that no preference shall ever be given by law to any religious society or mode of worship: and no religious test shall be required as a qualification to any office of trust or profit. But religion, morality, and knowledge, being essentially necessary to the government and the happiness of mankind, schools, and the means of instruction, shall forever be encouraged by legislative provision, not inconsistent with the rights of conscience.

"Private property ought, and shall ever be held inviolate, but always subservient to the public welfare, provided a compensation in money be made to the owner.

"That the people shall be secure in their persons, houses, papers, and possessions, from all unwarrantable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without probable evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described, and without oath or affirmation, are dangerous to liberty, and shall not be granted.

"That the printing presses shall be open and free to every citizen who wishes to examine the proceedings of any branch of government, or the conduct of any public officer; and no law shall ever restrain the right thereof. Every citizen has an indisputable right to speak, write, or print upon any subject as he thinks proper, being liable for the abuse of that liberty. In prosecutions for any publication respecting the official conduct of men in a public capacity, or where the matter published is proper for public information, the truth thereof may always be given in evidence; and in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases.

"That all courts shall be open, and every person for any injury done him in his lands, goods, person, or reputation, shall have remedy by the due course of law; and right and justice administered without denial or delay.

"That the right of trial by jury shall be inviolate.

"That no power of suspending the laws shall be exercised, unless by the legislature.

"That no person arrested or confined in jail shall be treated with unnecessary rigor, or be put to answer any criminal charge, but by presentment, indictment, or impeachment.

"That in all criminal prosecutions, the accused hath a right to be heard by himself and his counsel; to de-

mand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face; to have compulsory process for obtaining witnesses in his favour; and, in prosecutions by indictment or presentment, a speedy public trial by an impartial jury of the county or district in which the offence shall have been committed, and shall not be compelled to give evidence against himself—nor shall he be twice put in jeopardy for the same offence.

"That all persons shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident, or the presumption great; and the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

"Excessive bail shall not be required, excessive fines shall not be imposed, nor cruel and unusual punishments inflicted.

"All penalties shall be proportioned to the nature of the offence. No wise legislature will affix the same punishments to the crimes of theft, forgery, and the like, which they do to those of murder and treason. When the same undistinguished severity is exerted against all offences, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do the lighest offences. For the same reasons, a multitude of sanguinary laws are both impolitic and unjust; the true design of all punishments being to reform, not to exterminate mankind.

"The person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of his creditor or creditors, in such manner as shall be prescribed by law.

"No *ex post facto* law, nor any law impairing the va-

lidity of contracts, shall ever be made; and no conviction shall work corruption of blood, or forfeiture of estate.

"That no person shall be liable to be transported out of this state, for any offence committed within the state.

"That a frequent recurrence to the fundamental principles of civil government is absolutely necessary to preserve the blessings of liberty.

"That the people have a right to assemble together, in a peaceable manner, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances.

"That the people have a right to bear arms for the defence of themselves and the state; and, as standing armies in time of peace are dangerous to liberty, they shall not be kept up, and that the military shall be kept under strict subordination to the civil power.

"That no person in this state, except such as are employed in the army or navy of the United States, or militia in actual service, shall be subject to corporeal punishment under the military law.

"That no soldier, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in the manner prescribed by law.

"That the levying taxes by the poll is grievous and oppressive; therefore, the legislature shall never levy a poll tax for county or state purposes.

"That no hereditary emoluments, privileges, or honours shall ever be granted or conferred by this state.

"That no law shall be passed to prevent the poor in the several counties and townships within this state, from an equal participation in the schools, academies, colleges, and universities within this state, which are endowed, in whole or in part, from the revenue arising from the donations made by the United States for the support of schools and colleges; and the doors of the said schools, academies, and universities shall be open

for the reception of scholars, students, and teachers of every grade, without any distinction or preference whatever, contrary to the intent for which the said donations were made.

"That laws shall be passed by the legislature which shall secure to each and every denomination of religious societies, in each surveyed township, which now is, or may hereafter be, formed in the state, an equal participation, according to their number of adherents, of the profits arising from the land granted by congress for the support of religion, agreeably to the ordinance or act of congress making the appropriation.

"That every association of persons, when regularly formed within this state, and having given themselves a name, may, on application to the legislature, be entitled to receive letters of incorporation, to enable them to hold estates, real and personal, for the support of their schools, academies, colleges, universities, and other purposes.

"To guard against the transgression of the high powers which we have delegated, we declare, that all powers not hereby delegated remain with the people."

§ 105. The legislative authority of INDIANA is vested in a *General Assembly*, which consists of a Senate and a House of Representatives.

The representatives are chosen annually by electors of the respective counties; they consist of not less than thirty-six, nor more than one hundred.

The senators are chosen for three years in the same manner as the representatives, and consist of not less than one-third nor more than one-half of the number of representatives.

Each house chooses its own officers, except the president of the senate; is judge of the election, qualification, and returns of its own members, keeps a journal of proceedings, determines its own rules, punishes

its members for disorderly conduct, and expels them with a two-thirds vote.

Bills originate in either house, except bills for raising revenue, which must originate in the house of representatives, but may be amended or rejected by the senate. All bills must be signed by the president and speaker of the respective houses. Every bill must be read on three different days in each house, unless in case of urgency, two-thirds of the house where such bill may be depending shall deem it expedient to dispense with this rule.

The style of the laws is "Be it enacted by the general assembly of the state of Indiana."

The house of representatives have the sole power of impeachment, but all cases of that kind are tried by the senate.

Every bill which passes both houses is submitted to the governor for approval and signature before it becomes a law. If the governor disapproves of a bill, he must return it, with his objections, to the house in which it originated, which must enter the objections at large upon its journal, and proceed to reconsider it; if, after such reconsideration, a majority of all the members elected to that house shall pass it, then it must, with the objections of the governor, be sent to the other house to be reconsidered; and, if approved by a majority of all the members elected to that house, it becomes a law. But in such cases, the vote must be taken by yeas and nays, and the names of the persons voting for or against the bill, must be entered on the journals of each house. The return of the bill must be made by the governor within five days, (Sunday excepted,) or it becomes a law in like manner as if he had signed it, unless the general assembly, by its adjournment, prevent its return, in which case it becomes a law, unless sent back within three days after their next meeting. And the same rule ob-

tains in reference to every resolution which requires the concurrence of both houses.

The general assembly have full power to exclude from electing, or being elected, any person guilty of any infamous crime; they may fix by law the method of dividing the militia; provide for a general system of education; form a penal code; provide asylums for the unfortunate and infirm; and lay off new counties or towns at discretion, without reducing the old counties to less than 400 square miles.

It is expressly declared by Article X., Sec. 1, "There shall not be established or incorporated in this state any bank or banking company, or moneyed institution, for the purpose of issuing bills of credit, or bills payable to order or bearer: Provided, that nothing herein contained shall be so construed as to prevent the general assembly from establishing a state bank, and branches, not exceeding one branch for any three counties, to be established at such place within such counties as the directors of the state bank may select; provided there be subscribed and paid in specie, on the part of the individuals, a sum equal to thirty thousand dollars: Provided also, that the bank at Vincennes, and the Farmers and Mechanics Bank of Indiana, at Madison, shall be considered as incorporated banks, according to the true tenor of the charters granted to said banks by the legislature of the Indiana territory; Provided, that nothing herein contained shall be so construed as to prevent the general assembly from adopting either of the aforesaid banks, as the state bank; and in case either of them shall be adopted as the state bank, the other may become a branch, under the rules and regulations herein before prescribed."

Sections 7 and 8 of Article XI. provide:

"There shall be neither slavery nor involuntary servitude in this state, otherwise than for the punishment

of crimes, whereof the party shall have been duly convicted. Nor shall any indenture of any negro or mulatto, hereafter made and executed out of the bounds of this state, be of any validity within the state.

"No act of the general assembly shall be in force until it shall have been published in print, unless in cases of emergency."

§ 106. The legislative power of the state of LOUISIANA is vested in two branches, a House of Representatives and a Senate.

The representatives are elected biennially, by qualified electors, and consist of not less than twenty-five, nor more than fifty members. They choose their own officers, and the members are privileged from arrest, except in cases of treason, felony, or breach of the peace.

The senators are chosen for four years, by districts, and choose their own officers annually.

Each house judges the elections, qualifications, and returns of its own members, determines the rules of its proceedings, punishes and expels its members for disorderly behaviour.

The general assembly have power to regulate by law all writs of election, and establish inferior courts.

The house of representatives have the sole power of impeachment; but they are tried by the senate. All bills, orders, or resolutions, are signed by the governor previous to their becoming laws.

It is provided: "No bill shall have the force of a law until, on three several days, it be read over in each house of the general assembly, and free discussion allowed thereon: unless, in case of urgency, four-fifths of the house, where the bill shall be depending, may deem it expedient to dispense with this rule.

"All bills for raising revenue shall originate in the house of representatives, but the senate may propose

amendments as in other bills; provided, that they shall not introduce any new matter, under the color of amendment, which does not relate to raising a revenue."

Every bill, order, resolution, or vote, to which the concurrence of both houses shall be necessary, except on questions of adjournment, must be presented to the governor for approval. If he return it under objections, it may, notwithstanding such objections, be passed by a two-third vote of each house. If not returned within ten days, (Sundays excepted,) it becomes a law, unless prevented by an adjournment of the legislature, in which event it becomes a law, unless returned within three days after their next meeting.

It is also provided, "All laws that may be passed by the legislature of the state, and the judicial and legislative proceedings of the same, shall be promulgated, preserved, and conducted, in the language in which the constitution of the United States is written. No power of suspending the laws of the state shall be exercised, unless by the legislature, or its authority. In all criminal prosecutions the accused shall have the right of being heard by himself, or counsel; of demanding the nature and cause of the accusation against him; of meeting the witnesses face to face; of having compulsory process for obtaining witnesses in his favor; and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; nor shall he be compelled to give evidence against himself. All prisoners shall be bailable by sufficient securities, unless for capital offences, where the proof is evident or presumption great; and the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it. No *ex post facto* law, nor any law impairing the obligation of contracts, shall be passed. Printing presses shall be free to every person who undertakes to examine the proceedings

of the legislature, or any branch of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty."

Emigration from that state shall not be prohibited.

§ 107. The Constitution of MISSISSIPPI contains the following declaration of rights:

"That the general, great and essential principles of liberty and free government may be recognized and established, we declare—

"That all freemen, when they form a social compact, are equal in rights; and that no man, or set of men, are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services.

"That all political power is inherent in the people, and all free governments are founded on their authority and established for their benefit; and, therefore, they have at all times an inalienable and indefeasible right to alter or abolish their form of government, in such manner as they may think expedient.

"The exercise and enjoyment of religious profession and worship, without discrimination, shall forever be free to all persons in this state: Provided, that the right hereby declared and established shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state.

"No preference shall ever be given by law to any religious sect, or mode of worship.

"That no person shall be molested for his opinions on any subject whatever, nor suffer any civil or political incapacity, or acquire any civil or political advantage,

in consequence of such opinions, except in cases provided for in this constitution.

"Every citizen may freely speak, write and publish his sentiments on all subjects; being responsible for the abuse of that liberty.

"No law shall ever be passed to curtail or restrain the liberty of speech, or of the press.

"In all prosecutions or indictments for libel, the truth may be given in evidence; and if it shall appear to the jury that the matter charged as libellous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the facts.

"That the people shall be secure in their persons, houses, papers, and possessions, from unreasonable seizures and searches; and that no warrant to search any place, or to seize any person or thing, shall issue without describing the place to be searched, and the person or thing to be seized, as nearly as may be, nor without probable cause, supported by oath or affirmation.

"That in all criminal prosecutions, the accused hath a right to be heard by himself or counsel, or both; to demand the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and in all prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county where the offence was committed: that he cannot be compelled to give evidence against himself; nor can he be deprived of his life, liberty, or property, but by due course of law.

"No person shall be accused, arrested or detained, except in cases ascertained by law, and according to the form which the same has prescribed; and no person

shall be punished but in virtue of a law established and promulgated prior to the offence, and legally applied.

"That no person shall, for any indictable offence, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service, or by leave of the court, for misdemeanor in office.

"No person shall, for the same offence, be twice put in jeopardy of life or limb, nor shall any person's property be taken or applied to public use without the consent of the legislature, and without just compensation being first made therefor.

"That all courts shall be open, and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law; and right and justice administered without sale, denial, or delay.

"That no power of suspending laws shall be exercised except by the legislature, or its authority.

"That excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.

"That all prisoners shall before conviction be bailable by sufficient securities, except for capital offences, where the proof is evident, or the presumption great: and the privilege of the writ of *habeas corpus* shall not be suspended, unless, when in case of rebellion or invasion, the public safety may require it.

"That the person of a debtor, when there is not strong presumption of fraud, shall not be detained in prison, after delivering up his estate for the benefit of his creditors, in such manner as shall be prescribed by law.

"No conviction for any offence shall work corruption of blood or forfeiture of estate: The legislature shall pass no bill of attainder, *ex post facto* law, nor law impairing the obligation of contracts.

"No property qualification for eligibility to office, or

for the right of suffrage, shall ever be required by law in this state.

"That the estates of suicides shall descend or vest as in cases of natural death; and if any person shall be killed by casualty, there shall be no forfeiture by reason thereof.

"That the citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those vested with the powers of government for redress of grievances, or other proper purposes, by petition, address, or remonstrance.

"Every citizen has a right to bear arms in defence of himself and of the state.

"No standing army shall be kept up without the consent of the legislature; and the military shall, in all cases, and at all times, be in strict subordination to the civil power.

"That no soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in manner to be prescribed by law.

"That no hereditary emoluments, privileges, or honors shall ever be granted or conferred in this state.

"Emigration from this state shall not be prohibited, nor shall any free white citizen of this state ever be exiled under any pretence whatever.

"The right of trial by jury shall remain inviolate.

"No person shall be debarred from prosecuting or defending any civil cause for or against him or herself before any tribunal in this state, by him or herself, or counsel or both.

"No person shall ever be appointed or elected to any office in this state for life or during good behavior; but the tenure of all offices shall be for some limited period of time, if the person appointed or elected thereto shall so long behave well."

§ 108. The legislative department of Mississippi is

vested in two branches, a Senate and House of Representatives, styled "The Legislature of the State of Mississippi;" and the style of the laws is, "Be it enacted by the Legislature of the State of Mississippi."

The representatives are elected biennially by qualified electors of their respective counties, and are privileged from arrest, except in cases of treason, felony, or breach of the peace. They consist of not less than thirty-six nor more than one hundred.

The SENATORS are chosen by qualified electors for four years, consisting of never less than one-fourth nor more than one-half of the whole number of representatives.

Each house elects its own officers, judges of the election and qualification of its members, determines its own rule of proceedings, and punishes and expels its members for disorderly behavior.

Bills may originate in either house, and be amended, altered, or refused by the other, and all bills passed by both houses must be signed by the speaker and president of the respective houses before becoming laws. But all revenue bills must originate in the house of representatives, but the senate may alter, amend, or reject them.

The house of representatives have the sole power of impeachment, to be tried by the senate.

A majority of each house constitutes a quorum to do business, but a smaller number may adjourn from day to day.

Every bill, order, resolution, or vote to which the concurrence of both houses shall be necessary, except on questions of adjournment, must be presented to and signed by the governor or be returned by him with his objections within six days, Sundays excepted, after presented to him, unless prevented by the adjournment of the legislature. It may, however, upon reconsideration, be passed by a vote of two-thirds of each house, notwithstanding such objections. If a return of a bill with

objections within the time prescribed is prevented by an adjournment of the legislature it becomes a law.

The constitution also contains the following restrictions upon legislative power.

"No law of a general nature, unless otherwise provided for, shall be enforced until sixty days after the passage thereof.

"No law shall ever be passed to raise a loan of money upon the credit of the state, or to pledge the faith of the state for the payment or redemption of any loan or debt, unless such law be proposed in the senate or house of representatives, and be agreed to by a majority of the members of each house, and entered on their journals with the yeas and nays taken thereon, and be referred to the next succeeding legislature, and published for three months previous to the next regular election, in three newspapers of the state; and unless a majority of each branch of the legislature, so elected, after such publication, shall agree to, and pass such law; and in such case the yeas and nays shall be taken, and entered on the journals of each house: Provided, that nothing in this section shall be so construed as to prevent the legislature from negotiating a further loan of one and a half million of dollars, and vesting the same in stock reserved to the state by the charter of the Planters' Bank of the state of Mississippi.

"Divorces from the bonds of matrimony shall not be granted, but in cases provided for by law, by suit in chancery."

"The legislature shall have no power to pass laws for the emancipation of slaves without the consent of their owners, unless where the slave shall have rendered to the state some distinguished service; in which case the owner shall be paid a full equivalent for the slave so emancipated. They shall have no power to prevent emigrants to this state from bringing with them such

persons as are deemed slaves by the laws of any one of the United States, so long as any person of the same age or description shall be continued in slavery by the laws of this state: Provided, that such person or slave be the *bona fide* property of such emigrants; and provided, also, that laws may be passed to prohibit the introduction into this state of slaves who may have committed high crimes in other states. They shall have power to pass laws to permit the owners of slaves to emancipate them, saving the rights of creditors, and preventing them from becoming a public charge. They shall have full power to oblige the owners of slaves to treat them with humanity; to provide for them necessary clothing and provisions; to abstain from all injuries to them, extending to life or limb; and in case of their neglect or refusal to comply with the directions of such laws, to have such slave or slaves sold for the benefit of the owner or owners.

"The introduction of slaves into this state as merchandise, or for sale, shall be prohibited from and after the first day of May, eighteen hundred and thirty-three: Provided, that the actual settler or settlers shall not be prohibited from purchasing slaves in any state in this Union, and bringing them into this state for their own individual use, until the year eighteen hundred and forty-five."

§ 109. Art. 8 of the constitution of Illinois contains a declaration of rights as follows:

"That the general, great, and essential principles of liberty and free government may be recognized and unalterably established, we declare:

"That all men are born equally free and independent, and have certain inherent and indefeasible rights; among which are those of enjoying and defending life and liberty, and of acquiring, possessing, and protecting pro-

perty and reputation, and of pursuing their own happiness.

"That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness.

"That all men have a natural and indefeasible right to worship Almighty God, according to the dictates of their own consciences; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given by law to any religious establishments or modes of worship.

"That no religious test shall ever be required as a qualification to any office or public trust under this state.

"That elections shall be free and equal.

"That the right of the trial by jury shall remain inviolate.

"That the people shall be secure in their persons, houses, papers, and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described, and supported by evidence, are dangerous to liberty, and ought not to be granted.

"That no freeman shall be imprisoned or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the judgment of his peers, or the law of the land. And all lands which have been granted as a common to the inhabitants of any town, hamlet, village, or corporation, by any person, body politic or cor-

porate, or by any government having power to make such grant, shall for ever remain common to the inhabitants of such town, hamlet, village, or corporation: and the said commons shall not be leased, sold, or divided, under any pretence whatever: Provided, however, that nothing in this section shall be so construed as to affect the commons of Cahokia or Prairie Dupont: Provided, also, that the general assembly shall have power and authority to grant the same privilege to the inhabitants of the said villages of Cahokia and Prairie Dupont as are hereby granted to the inhabitants of other towns, hamlets, and villages.

"That in all criminal prosecutions, the accused hath a right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his favor; and in prosecutions by indictment or information, a speedy public trial, by an impartial jury of the vicinage: and that he shall not be compelled to give evidence against himself.

"That no person shall, for any indictable offence, be proceeded against criminally, by information, except in cases arising in the land or naval forces, or the militia when in actual service, in time of war or public danger, by leave of the courts, for oppression or misdemeanor in office.

"No person shall, for the same offence, be twice put in jeopardy of his life or limb; nor shall any man's property be taken or applied to public use without the consent of his representatives in the general assembly, nor without just compensation being made to him.

"Every person within this state ought to find a certain remedy in the laws, for all injuries or wrongs which he may receive in his person, property, or character: he ought to obtain right and justice freely, and without being

obliged to purchase it; completely, and without denial; promptly and without delay, conformably to the laws.

"That all persons shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident or the presumption great; and the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it.

"All penalties shall be proportioned to the nature of the offence; the true design of all punishments being to reform, and not to exterminate mankind.

"No person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors, in such manner as shall be prescribed by law, or in cases where there is strong presumption of fraud.

"No *ex post facto* law, nor any law impairing the validity of contracts shall ever be made; and no conviction shall work corruption of blood or forfeiture of estate.

"That no person shall be liable to be transported out of this state for any offence committed within the same.

"That a frequent recurrence to the fundamental principles of civil government is absolutely necessary to preserve the blessings of liberty.

"That the people have a right to assemble together in a peaceable manner, to consult for their common good, to instruct their representatives, and to apply to the general assembly for redress of grievances.

"That the mode of levying a tax shall be by valuation; so that every person shall pay a tax in proportion to the value of the property he or she has in his or her possession.

"That there shall be no other banks or moneyed institutions in this state but those already provided by law, except a state bank and its branches, which may be es-

tablished and regulated by the general assembly of the state, as they may think proper.

"That printing presses shall be free to every person who undertakes to examine the proceedings of the general assembly, or of any branch of government; and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, or print, on any subject, being responsible for the abuse of that liberty.

"In prosecutions for the publication of papers investigating the official conduct of officers, or men acting in a political capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels, the jury shall have the right of determining both the law and the fact, under the direction of the court, as in other cases.

§ 110. The constitution of the state of Illinois provides the legislative power shall be vested in a general assembly, consisting of a senate and a house of representatives, elected by the people.

The representatives are elected for two years by qualified electors, and are apportioned among the several counties.

The senators are elected for four years, and are divided into two classes, each holding the seats two years.

The number of representatives is never less than twenty-seven nor more than thirty-six, and the number of the senators never less than one-third or more than one-half the number of representatives.

Each house elects its own officers, except the speaker of the senate, and judges of the election and qualifications of its own members.

Each house keeps a journal of proceedings, determines its own rules, punishes its members for disorderly behavior, and, with the consent of two-thirds, expels a member.

Senators and representatives are privileged from arrest, except in cases of treason, felony, or breach of the peace.

Bills may originate in either house, but may be altered, amended, or rejected by the other. Except revenue bills, must originate in the house of representatives, subject to amendment or rejection by the senate. Every bill must be read on three different days in each house, unless in case of urgency three-fourths of the house where it is pending shall see fit to dispense with this rule.

The style of the laws is, "Be it enacted by the people of the State of Illinois, represented in the General Assembly."

The house of representatives has the sole power of impeachment, to be tried by the senate.

Every bill which has passed both houses must be signed by the speakers of the respective houses.

By section 19 of article 3, page 323, it is provided:

"The governor, for the time being, and the judges of the supreme court, or a major part of them, together with the governor, shall be and are hereby constituted a council to revise all bills about to be passed into laws by the general assembly; and for that purpose shall assemble themselves from time to time when the general assembly shall be convened; for which, nevertheless, they shall not receive any salary or consideration, under any pretence whatever; and all bills which have passed the senate and house of representatives, shall, before they become laws, be presented to the said council for their revisal and consideration; and if upon such revisal and consideration, it should appear improper to the said council, or a majority of them, that the bill should become a law of this state, they shall return the same, together with their objections thereto, in writing, to the senate or house of representatives, (in whichsoever the

same shall have originated,) who shall enter the objections set down by the council, at large, in their minutes, and proceed to reconsider the said bill. But if, after such reconsideration, the said senate or house of representatives shall, notwithstanding the said objections, agree to pass the same, by a majority of the whole number of members elected, it shall, together with the said objections, be sent to the other branch of the general assembly, where it shall also be reconsidered; and if approved by a majority of all the members elected, it shall become a law. If any bill shall not be returned within ten days after it shall have been presented, the same shall be law; unless the general assembly shall, by their adjournment, render a return of the said bill, in ten days, impracticable; in which case the said bill shall be returned on the first day of the meeting of the general assembly after the expiration of the said ten days, or be a law."

Section 1 of article 6 provides:

"Neither slavery nor involuntary servitude shall hereafter be introduced into this state, otherwise than for the punishment of crimes whereof the party shall have been duly convicted; nor shall any male person, arrived at the age of twenty-one years, nor female person arrived at the age of eighteen years, be held to serve any person as a servant, under any indenture hereafter made, unless such person shall enter into such indenture while in a state of perfect freedom, and on condition of a *bona fide* consideration, received, or to be received, for their service. Nor shall any indenture of any negro or mulatto hereafter made and executed out of this state, or, if made in this state, where the term of service exceeds one year, be of the least validity, except those given in cases of apprenticeship."

§ 111. Art. 1 of the constitution of Alabama contains a declaration of rights, as follows:

"That the general, great and essential principles of liberty and free government may be recognized and established, we declare—

"That all freemen, when they form a social compact, are equal in rights; and that no man, or set of men, are entitled to exclusive, separate public emoluments or privileges, but in consideration of public services.

"All political power is inherent in the people, and all free governments are founded on their authority and instituted for their benefit; and, therefore, they have at all times an unalienable and indefeasible right to alter, reform, or abolish their form of government, in such manner as they may think expedient.

"No person within this state shall, upon any pretence, be deprived of the inestimable privilege of worshipping God in the manner most agreeable to his own conscience; nor be compelled to attend any place of worship; nor shall any one ever be obliged to pay any tithes, taxes, or other rate, for the building or repairing any place of worship, or for the maintenance of any minister or ministry.

"No human authority ought, in any case whatever, to control or interfere with the rights of conscience.

"No person shall be hurt, molested, or restrained, in his religious profession, sentiments, or persuasions, provided he does not disturb others in their religious worship.

"The civil rights, privileges, or capacities of any citizen, shall in no way be diminished, or enlarged, on account of his religious principles.

"There shall be no establishment of religion by law; no preference shall ever be given by law to any religious sect, society, denomination, or mode of worship: and no religious test shall ever be required as a qualification to any office or public trust under this state.

"Every citizen may freely speak, write and publish

his sentiments on all subjects; being responsible for the abuse of that liberty.

"The people shall be secure in their persons, houses, papers, and possessions, from unreasonable seizures or searches; and no warrant to search any place, or to seize any person or thing, shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation.

"In all criminal prosecutions, the accused has a right to be heard by himself and counsel; to demand the nature and cause of the accusation, and have a copy thereof: to be confronted by the witnesses against him: to have compulsory process for obtaining witnesses in his favor; and in all prosecutions, by indictment or information, a speedy public trial by an impartial jury of the county or district in which the offence shall have been committed: he shall not be compelled to give evidence against himself, nor shall he be deprived of his life, liberty, or property, but by due course of law.

"No person shall be accused, arrested or detained, except in cases ascertained by law, and according to the forms which the same has prescribed; and no person shall be punished but in virtue of a law established and promulgated prior to the offence, and legally applied.

"No person shall, for any indictable offence, be proceeded against criminally by information, except in cases arising in the land and naval forces, or the militia, when in actual service, or by leave of the court, for oppression or misdemeanor in office.

"No person shall, for the same offence, be twice put in jeopardy of life or limb, nor shall any person's property be taken or applied to public use unless just compensation be made therefor.

"All courts shall be open, and every person for an injury done him in his lands, goods, person, or repu-

tation, shall have remedy by due course of law; and right and justice administered without sale, denial, or delay.

"No power of suspending laws shall be exercised except by the general assembly or its authority.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.

"All persons shall, before conviction, be bailable by sufficient securities, except for capital offences, when the proof is evident, or the presumption great; and the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

"The person of a debtor, where there is not strong presumption of fraud, shall not be detained in prison after delivering up his estate for the benefit of his creditors, in such manner as shall be prescribed by law.

"No *ex post facto* law, nor law impairing the obligation of contracts, shall be made.

"No person shall be attainted of treason or felony by the general assembly. No attainder shall work corruption of blood, nor forfeiture of estate.

"The estates of suicides shall descend or vest as in cases of natural death; if any person shall be killed by casualty there shall be no forfeiture by reason thereof.

"The citizens have a right, in a peaceable manner, to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances, or other proper purposes, by petition, address, or remonstrance.

"Every citizen has a right to bear arms in defence of himself and the state.

"No standing army shall be kept up without the consent of the general assembly; and, in that case, no appropriation of money for its support shall be for a longer

term than one year; and the military shall, in all cases, and at all times, be in strict subordination to the civil power.

"No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

"No title of nobility, or hereditary distinction, privilege, honor, or emolument, shall ever be granted or conferred in this state; nor shall any office be created, the appointment of which shall be for a longer term than during good behavior.

"Emigration from this state shall not be prohibited, nor shall any citizen be exiled.

"The right of trial by jury shall remain inviolate.

"No person shall be debarred from prosecuting or defending any civil cause for or against him or herself before any tribunal in this state, by him or herself, or counsel.

"This enumeration of certain rights shall not be construed to deny or disparage others retained by the people: and to guard against any encroachments on the rights herein retained, or any transgression of any of the high powers herein delegated, we declare, that every thing in this article is excepted out of the general powers of government, and shall for ever remain inviolate; and that all laws contrary thereto, or to the following provisions, shall be void.

§ 112. The legislative power of the state of Alabama is vested in two branches, a senate and a house of representatives, styled together the General Assembly of the state of Alabama. The style of laws is, "Be it enacted by the Senate and House of Representatives of the state of Alabama, in General Assembly convened."

The representatives are chosen annually by qualified electors, and are apportioned among the several counties, and consist of not less than forty-four nor more than

sixty members, until the inhabitants amount to 100,000, and after that they are never less than sixty, nor more than one hundred.

The senators are chosen by qualified electors from the several districts, for the term of three years, and consist of not less than one-fourth nor more than one-third of the number of representatives.

Each house chooses its own officers, judges of the elections, qualifications, and returns of its members, punishes or expels them for disorderly conduct, and has all other powers necessary for a branch of the legislature of a free and independent state.

Senators and representatives are privileged from arrest except in cases of treason, felony, or breach of the peace.

Bills may originate in either house, and be amended, altered, or rejected by the other; but no bill shall have the force of a law until, on three several days, it be read in each house, and free discussion be allowed thereon, unless, in cases of urgency, four-fifths of the house in which the bill shall be depending may deem it expedient to dispense with this rule. And every bill, having passed both houses, shall be signed by the speaker and president of the respective houses; provided, that all bills for raising revenue shall originate in the house of representatives, but the senate may amend or reject them as other bills.

Every bill which shall have passed both houses must be presented to the governor for his approval, if he approves it he must sign it, if not he must return it with his objections; it may, however, notwithstanding the objections of the governor, upon reconsideration, be passed by a majority of the whole number elected by each branch of the legislature, if not returned with objections in five days, Sunday excepted, it becomes a law, unless the legislature by adjournment prevent its return, in which

case it does not become a law. The same rule obtains in reference to every order, resolution, or vote, to which the concurrence of both houses may be necessary; except on questions of adjournment.

The house of representatives has the sole power of impeachment, but all cases of this nature are tried by the senate.

The general assembly have full power to pass laws excluding from office, suffrages, or serving as jurors, all persons convicted of infamous crimes or misdemeanors, direct by law how or in what manner suits are to be brought against the state, to regulate by law the duties and salaries of public officers, fix boundaries to counties, pass laws to decide differences by arbitrators, form a penal code, and make provision for obtaining correct information for the improvement of navigation and roads of the state.

The constitution also contains the following restrictions upon legislative power. Divorces from bonds of matrimony shall not be granted but in cases provided for by law, by suit in chancery; and no decree for such divorce shall have effect until the same shall be sanctioned by two-thirds of both houses of the general assembly.(*a*)

The general assembly shall have no power to pass laws for the emancipation of slaves without the consent of their owners, or without paying their owners, previous to such emancipation, a full equivalent in money for the slaves so emancipated. They shall have no power to prevent emigrants to this state from bringing with them such persons as are deemed slaves by the laws of any one of the United States, so long as any person of the same age or description shall be continued in slavery by

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(*a*) Art. 6, § 13.

the laws of this state: Provided, that such person or slave be the *bona fide* property of such emigrants: And provided, also, that laws may be passed to prohibit the introduction into this state of slaves who have committed high crimes in other states or territories.

§ 113. Art. 13 of the constitution of Missouri contains a declaration of rights, as follows:

"That the general, great, and essential principles of liberty and free government may be recognized and established, we declare:

"That all political power is vested in, and derived from the people.

"That the people of this state have the inherent, sole, and exclusive right of regulating the internal government and police thereof; and of altering or abolishing their constitution and form of government, whenever it may be necessary to their safety and happiness.

"That the people have the right peaceably to assemble for their common good, and to apply to those vested with the powers of government for redress of grievances, by petition or remonstrance; and that their right to bear arms in defence of themselves and of the state cannot be questioned.

"That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man can be compelled to erect, support, or attend any place of worship, or to maintain any minister of the gospel or teacher of religion; that no human authority can control or interfere with the rights of conscience; that no person can ever be hurt, molested, or restrained in his religious profession, or sentiments, if he do not disturb others in their religious worship.

"That no person, on account of his religious opinions, can be rendered ineligible to any office of trust or profit under this state; that no preference can ever be given

by law to any sect or mode of worship; and that no religious corporation can ever be established in this state.

"That all elections shall be free and equal.

"That courts of justice ought to be open to every person, and certain remedy afforded for every injury to person, property, or character; and that right and justice ought to be administered without sale, denial, or delay; and that no private property ought to be taken or applied to public use without just compensation.

"That the right of trial by jury shall remain inviolate.

"That in all criminal prosecutions, the accused has the right to be heard by himself and his counsel; to demand the nature and cause of accusations; to have compulsory process for witnesses in his favor; to meet the witnesses against him face to face; and, in prosecutions on presentment or indictment, to a speedy trial, by an impartial jury of the vicinage; that the accused cannot be compelled to give evidence against himself; nor be deprived of life, liberty, or property, but by the judgment of his peers, or the law of the land.

"That no person, after having been once acquitted by a jury, can, for the same offence be again put in jeopardy of life or limb; but if in any criminal prosecution the jury be divided in opinion at the end of the term, the court before which the trial shall be had, may, in its discretion, discharge the jury, and commit or bail the accused for trial at the next term of such court.

"That all persons shall be bailable by sufficient sureties, except for capital offences when the proof is evident or the presumption great. And the privilege of the writ of *habeas corpus* cannot be suspended, unless when in cases of rebellion or invasion the public safety may require it.

"That excessive bail shall not be required, nor ex-

cessive fines imposed, nor cruel and unusual punishments inflicted.

"That the people ought to be secure in their persons, papers, houses, and effects, from unreasonable searches and seizures; and no warrant to search any place, or to seize any person or thing, can issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be, nor without probable cause, supported by oath or affirmation.

"That no person can, for an indictable offence, be proceeded against criminally, by information, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger, or by leave of the court, for oppression or misdemeanor in office.

"That treason against the state can consist only in levying war against it, or in adhering to its enemies, giving them aid and comfort: that no person can be convicted of treason unless on the testimony of two witnesses to the same overt act, or on his own confession in open court; that no person can be attainted of treason or felony by the general assembly; that no conviction can work corruption of blood, or forfeiture of estate; that the estates of such persons as may destroy their own lives shall descend or vest as in cases of natural death; and when any person shall be killed by casualty, there ought to be no forfeiture by reason thereof.

"That the free communication of thoughts and opinions is one of the invaluable rights of man, and that every person may freely speak, write, and print on any subject, being responsible for the abuse of that liberty; that in all prosecutions for libels, the truth thereof may be given in evidence, and the jury may determine the law and the facts, under the direction of the court.

"That no *ex post facto* law, nor law impairing the obligation of contracts, or retrospective in its operations,

can be passed; nor can the person of a debtor be imprisoned for debt after he shall have surrendered his property for the benefit of his creditors in such manner as may be prescribed by law.

"That no person who is religiously scrupulous of bearing arms can be compelled to do so, but may be compelled to pay an equivalent for military service, in such manner as shall be prescribed by law; and that no priest, preacher of the gospel, or teacher of any religious persuasion or sect, regularly ordained as such, be subject to militia duty, or compelled to bear arms.

"That all property, subject to taxation in this state, shall be taxed in proportion to its value.

"That no title of nobility, hereditary emolument, privilege, or distinction, shall be granted; nor any office created, the duration of which shall be longer than the good behavior of the officer appointed to fill the same.

"That emigration from this state cannot be prohibited.

"That the military is, and in all cases, and at all times, shall be in strict subordination to the civil power; that no soldier can, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war but in such manner as may be prescribed by law; nor can any appropriation for the support of any army be made for a longer period than two years."

§ 114. The legislative power of this state is vested in a general assembly, consisting of a senate and house of representatives. A majority of each house constitutes a quorum to do business; and have power to determine rules of proceedings, punish members, &c. Bills may originate in either house and may be altered, amended, or rejected by the other. Every bill must be read on three different days in each house, unless two-thirds of the house in which it shall be pending shall dispense

with this rule. Every bill which passes both houses must be signed by the speaker of the house of representatives and by the president of the senate, and before it becomes a law must be presented to the governor for approval. If he disapproves of it he must return it with objections, and, in that event, notwithstanding such objections, it may, upon reconsideration, be passed by a majority of all the members elected to each house. If not returned with objections within ten days, Sundays excepted, it becomes a law, unless its return is prevented by an adjournment of the general assembly, in which event it does not become a law. The same rule obtains in reference to every resolution to which the concurrence of both houses is necessary; except on questions of adjournment.

The constitution also contains the following restrictions upon legislative power: The general assembly shall not have power to pass laws for the emancipation of slaves, without the consent of their owners, or without paying them, before such emancipation, a full equivalent for such slaves, so emancipated; and, to prevent *bona fide* emigrants to this state, or actual settlers therein, from bringing from any of the United States, or from any of their territories, such persons as may there be deemed to be slaves, so long as any persons of the same description are allowed to be held as slaves by the laws of this state.(*a*)

The general assembly of this state shall never interfere with the primary disposal of the soil of the United States, nor with any regulation congress may find necessary for securing the title in such soil to the *bona fide* purchasers. No tax shall be imposed on lands the property of the United States, nor shall lands belonging to persons residing out of the limits of this state ever be

(*a*) Art. 3, sec. 26.

taxed higher than the lands belonging to persons residing within this state.(*a*)

§ 115. The constitution of the state of Michigan contains the following declaration of rights:

"All political power is inherent in the people.

"Government is instituted for the protection, security, and benefit of the people; and they have the right at all times to alter or reform the same, and to abolish one form of government and establish another, whenever the public good requires it.

"No man or set of men are entitled to exclusive or separate privileges.

"Every person has a right to worship Almighty God according to the dictates of his own conscience; and no person can of right be compelled to attend, erect, or support, against his will, any place of religious worship, or pay any tithes, taxes, or other rates for the support of any minister of the gospel or teacher of religion.

"No money shall be drawn from the treasury for the benefit of religious societies, or theological or religious seminaries.

"The civil and political rights, privileges, and capacities of no individual shall be diminished or enlarged on account of his opinions or belief concerning matters of religion.

"Every person may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no laws shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury, that the matter charged as libellous is true, and was published with good motives and for justi-

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(*a*) Art. 10, sec. 1.

fiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

"The person, houses, papers, and possessions of every individual shall be secure from unreasonable searches and seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them, nor without probable cause, supported by oath or affirmation.

"The right of trial by jury shall remain inviolate.

"In all criminal prosecutions, the accused shall have the right to a speedy and public trial by an impartial jury of the vicinage; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to have the assistance of counsel for his defence; and in all civil cases, in which personal liberty may be involved, the trial by jury shall not be refused.

"No person shall be held to answer for a criminal offence, unless on the presentment or indictment of a grand jury, except in cases of impeachment or in cases cognizable by justices of the peace, or arising in the army or militia when in actual service in time of war or public danger.

"No person for the same offence shall be twice put in jeopardy of punishment; all persons shall, before conviction, be bailable by sufficient sureties, except for capital offences, when the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when, in case of rebellion or invasion the public safety may require it.

"Every person has a right to bear arms for the defence of himself and the State.

"The military shall, in cases and at all times, be in strict subordination to the civil power.

"No soldier shall, in time of peace, be quartered in

any house without the consent of the owner, nor in time of war but in a manner prescribed by law.

"Treason against the State shall consist only in levying war against it, or in adhering to its enemies, giving them aid and comfort; no person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.

"No bill of attainder, ex post facto law, or law impairing the obligation of contracts, shall be passed.

"Excessive bail shall not be required; excessive fines shall not be imposed; and cruel and unjust punishments shall not be inflicted.

"The property of no person shall be taken for public use, without just compensation therefor.

"The people shall have the right freely to assemble together, to consult for the common good, to instruct their representatives, and to petition the legislature for redress of grievances.

"All acts of the legislature, contrary to this or any other article of this constitution, shall be void.

§ 116. The legislative power of this state is vested in a senate and house of representatives. The house to consist of not less than 48, nor more than 100 members. The senate to be equal to one third of the house. A majority constitutes a quorum to do business. Any bill may originate in either house of the legislature.

Every bill must be presented to the Governor, for approval. If not approved must be returned with objections, and upon reconsideration, may be passed by a vote of two-thirds of each house. If not returned in ten days, Sundays excepted, it becomes a law unless the legislature prevent its return by adjournment, in which case it does not become a law. The same rule applies to all concurrent resolutions, except on questions of adjournment.

The constitution of this state also contains the following restrictions upon legislative power.

Neither slavery nor involuntary servitude shall ever be introduced into this state, except for the punishment of crimes of which the party shall have been duly convicted. The legislature shall pass no act of incorporation, unless with the assent of at least two-thirds of each house. Divorces shall not be granted by the legislature, but the legislature may by law authorize the higher courts to grant them, under such restrictions as they may deem expedient. No lottery shall be authorized by this state, nor shall the sale of lottery tickets be allowed.

§ 117. The declaration of rights contained inthe constitution of Arkansas provides:

"That the great and essential principles of liberty and free government may be recognized and unalterably established, we declare:

"That all freemen, when they form a social compact, are equal, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty; of acquiring, possessing, and protecting property and reputation; and of pursuing their own happiness.

"That all power is inherent in the people; and all free governments are founded on their authority, and instituted for their peace, safety, and happiness. For the advancement of these ends, they have, at all times, an unqualified right to alter, reform, or abolish their government, in such manner as they may think proper.

"That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; and no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent. That no human authority can, in any case whatever, interfere

with the rights of conscience; and that no preference shall ever be given to any religious establishment or mode of worship.

"That the civil rights, privileges, or capacities of any citizen, shall in nowise be diminished or enlarged, on account of his religion.

"That all elections shall be free and equal.

"That the right of trial by jury shall remain inviolate.

"That printing presses shall be free to every person; and no law shall ever be made to restrain the rights thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print, on any subject, being responsible for the abuse of that liberty.

"In prosecutions for the publication of papers investigating the official conduct of officers or men in public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels the jury may have the right to determine the law and the facts.

"That the people shall be secure in their persons, houses, papers, and possessions, from unreasonable searches and seizures; and that general warrants, whereby any officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described, and supported by evidence, are dangerous to liberty, and shall not be granted.

"That no freeman shall be taken or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers, or the law of the land.

"That in all criminal prosecutions, the accused hath a

right to be heard by himself and counsel, to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face; to have compulsory process for obtaining witnesses in his favor; and in prosecutions by indictment or presentment, a speedy public trial by an impartial jury of the county or district in which the crime shall have been committed; and shall not be compelled to give evidence against himself.

"That no person shall, for the same offence, be twice put in jeopardy of life or limb.

"That all penalties shall be reasonable, and proportioned to the nature of the offence.

"That no man shall be put to answer any criminal charge, but by presentment, indictment, or impeachment.

"That no conviction shall work corruption of blood, or forfeiture of estate.

"That all prisoners shall be bailable by sufficient securities, unless in capital offences, where the proof is evident, or the presumption great: and the privilege of the writ of *habeas corpus* shall not be suspended, unless, where in case of rebellion or invasion, the public safety may require it.

"That excessive bail shall in no case be required, nor excessive fines imposed.

"That no *ex post facto* law, nor any law impairing the obligation of contracts, shall ever be made.

"That perpetuities and monopolies are contrary to the genius of a republic, and shall not be allowed; nor shall any hereditary emoluments, privileges, or honors ever be granted or conferred in this state.

"That the citizens have a right in a peaceable manner to assemble together for their common good, to instruct their representatives, and apply to those invested with

the power of government for redress of grievances, or other proper purposes, by address, or remonstrance.

"That the free white men of this state shall have a right to keep and to bear arms for their common defence.

"That no soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in manner prescribed by law.

"The military shall be kept in strict subordination to the civil power.

"This enumeration of rights shall not be construed to deny or disparage others retained by the people; and, to guard against any encroachments on the rights herein retained, or any transgression of any of the higher powers herein delegated, we declare, that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate; and that all laws contrary thereto, or to the other provisions herein contained, shall be void."

§ 118. The legislative power of this state is vested in a general assembly, which consists of a senate and house of assembly. Two-thirds of each house constitutes a quorum. Bills may originate in either house, and be amended or rejected in the other. Every bill must be read on three different days in each house, unless two-thirds of the house in which it shall be pending shall dispense with the rule. Every bill, having passed each house, shall be signed by the president of the senate and the speaker of the house.

The style of the laws is, "Be it enacted by the General Assembly of the State of Arkansas."

Every bill, when passed both houses, must be presented to the governor for approval. If not approved it must be returned with his objections; when, upon reconsideration, it may be passed by a vote of a majority

of the whole number elected to each house. If not returned within three days it becomes a law, unless prevented by an adjournment; in which case it does not become a law. The same rule obtains in reference to concurrent orders and resolutions, except on questions of adjournment.

The constitution of this state also contains the following restrictions upon legislative power:

The general assembly shall have no power to pass laws for the emancipation of slaves, without the consent of the owners. They shall have no power to prevent emigrants to this state from bringing with them such persons as are deemed slaves by the laws of any one of the United States.(*a*)

No lottery shall be authorized by this state, nor shall the sale of lottery tickets be allowed.(*b*)

The person of a debtor, except where there is a strong presumption of fraud, shall neither be imprisoned nor continued in prison, after delivering up his estate for the benefit of his creditors, in such manner as may be prescribed by law.(*c*)

All revenue shall be raised by taxation, to be fixed by law. All property subject to taxation shall be taxed according to its value, and that value to be ascertained in such manner as the general assembly shall direct, making the same equal and uniform throughout the state. No one species of property from which a tax may be collected, shall be taxed higher, than another species of property of equal value: Provided, the general assembly shall have power to tax merchants, bankers, pedlers, and privileges, in such manner as may from time to time be prescribed by law; and provided further, that no other or greater amounts of revenue shall at any time be levied,

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(*a*) Art. 9, sec. 81. (*b*) Art. 9, sec. 6.
(*c*) Art. 9. sec. 11.

than required for the necessary expenses of government, unless by a concurrence of two-thirds of both houses of the general assembly. No poll tax shall be assessed for other than county purposes. No other or greater tax shall be levied on the productions or labor of the country than may be required for expenses of inspection.

CHAPTER VII.

OF LEGISLATIVE POWER IRRESPECTIVE OF CONSTITUTIONAL RESTRICTIONS.

§ 119. In the preceding chapter we have stated generally the provisions contained in the respective state constitutions, relating to the power of the respective state legislatures. In subsequent chapters we shall take occasion to consider the restrictive clauses, and the construction which such restrictive clauses have received. In the present chapter we shall proceed to a consideration of the extent of legislative authority, irrespective of any constitutional restrictions upon legislative power.

The law making power in almost all modern civilized governments, is vested in the representatives of the people, selected in the manner prescribed by the fundamental law or municipal regulations of each particular government; whose powers are regulated either by an express written compact, or limited only by what is tacitly reserved to the people, on whose consent their right of government is founded. In the legislative department of government in this respect is usually vested the sovereign power of the state. By sovereignty is commonly understood supremacy, supreme power, unlimited and uncontrolled. The word sovereignty, however, is used in different senses, and is susceptible of various applications. When applied to states and nations in relation to each other, it means nothing more than independence. A sovereign state in a political sense, is a state or nation in the free and uncontrolled possession of self-government. In this application of the term there is no idea of supremacy but simply that of

national independence. But when applied to the internal government of a state, it is made to signify a power somewhere vested, competent to regulate, control, and direct the will of the whole and of every subordinate member of the community. To this end it is by some supposed to be absolute, unlimited, and incapable of being controlled. As to the extent of sovereign power, in whatever department of the government it may be lodged, and whether it is to be considered as absolute and beyond control, where there is no written fundamental law setting limits to such power, there is great diversity of opinion among ethical and judicial writers. Among the former, Paley considers it a well settled principle, that the sovereign power is necessarily lodged in some department where it is absolute and uncontrolled. His reasonings on this point are, "as a series of appeals must be finite, there necessarily exists in every government, a power from which the constitution has provided no appeal, and which power for that reason may be termed absolute, uncontrollable, arbitrary, despotic, and is alike in all countries. The person in whom this power resides is called the sovereign, or supreme power of the state, and since to the same power, universally pertains the office of establishing public laws; it is called also the legislative power of the state."(*a*)

§ 120. Burlamaqui contends, "That the first characteristic of this sovereign power, and that from which all the others flow, is its being a supreme and independent power; that is, a power that judges in the last resort of whatever is susceptible of human direction, which relates to the welfare and advantage of society, insomuch that this power acknowledges no other superior on earth." When he says the civil power is, of its own nature, supreme and independent, he does not thereby mean

(*a*) Mor. Phi. 2 pt. 185.

that it does not depend for its origin on the human will; all that he contends for is, when once this power is established, it acknowledges no other upon earth superior or equal to it; and consequently, whatever it ordains, in the plenitude of its power, cannot be reversed by any other human will as superior to it. That in every government there should be a supreme power, is a point absolutely necessary, the very nature of the thing requiring it, otherwise it would be impossible for it to subsist.

For, since power cannot be multiplied to infinity, we must of necessity stop at some degree of authority superior to all. Let the form of government be what it may, there must always be a submission to a supreme decision, and it would be a contradiction to say, that there is any power above him who holds the highest rank in the same order of beings.(*a*)

§ 121. Wooddesson, speaking of the extent of legislative power, regards it as certain, that no human authority can rightfully infringe, or abrogate the smallest particle of natural or divine law. Yet he adds, a British judge of highly deserved estimation, seems in some measure unguarded, in asserting from the bench, that an act of parliament, made against natural equity, as to make a man judge in his own case, is void of itself; for *jura natura sunt immutabilia*, and they are *leges legum*. Wooddesson admits that this principle is infallibly true, but the application of it, and the conclusions dangerous; that we should distinguish between *right* and *power;* between *moral fitness* and *political authority*. We cannot expect that all acts of legislators will be, or can be entirely good, ethically perfect, but if their proceedings are to be decided upon by their subjects, government and

(*a*) Prin. Pol. Law, tit. 2, ch. 7.

subordination ceases. He thinks with Paley, if the magistrate should enjoin any thing by his authority, that appears unlawful to the conscience of a private person, that such private person is to abstain from the action, that he judges unlawful, and to undergo the punishment which it is not unlawful for him to bear. In like manner, when the supreme power decrees any thing injurious to one, or a few only of its subjects, it is their duty according to the principles inculcated in the decalogue of Plato, entitled *Crito*, to acquiesce, and not to disturb the peace of society, nor attempt to subvert the constitution of their country, or diminish the veneration for its laws, which would be bringing a greater evil upon the whole community.(*a*)

§ 122. The judicious Hooker insists, with that quaintness of thought which characterizes all his writings, that law politic, ordained for external order and regimen among men, unless they provide so to frame their outward actions that they be no hindrance to the common good for which societies are instituted, they are not perfect. That human laws are measures in respect of men; whose actions they must direct; howbeit, such measures they are, as have also their higher rules to be measured by; which rules are two: *the law of God*, and the *law of nature*. So that human laws must be made according to the general laws of nature, and without contradiction to any positive law of scripture, otherwise they are *illy made*.(*b*)

§ 123. The opinions of almost all the ancient writers on political sovereignty, based the doctrine of the absolute and sacred character of sovereignty upon the false assumption that princes bear rule by divine right, and not by virtue of the tacit or expressed consent of the

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(*a*) 1 Wodd. L. 3, p. 41.

(*b*) Hook. Eccl. Pol. b. 1, sec. 10. B. 3, sec. 9.

governed. Upon this assumption, that God, by his immediate act, conferred the sovereignty upon princes, has originated much of the fallacious reasoning of ethical and political writers, who have construed the permission of Deity that princes should bear rule, into an absolutely delegated authority as the vicegerents of Deity on earth. Grotius and Puffendorf first called in question the doctrine of sovereignty by divine right, and derived it from civil compact; although the latter when speaking of the civil compact, calls it a covenant, which afforded a full and easy title, by which it appeared that sovereignty was not established by violence, but by voluntary consent and subjection of the respective members, from which cause it resulted; still, he did not wholly abandon the doctrine of DIVINE RIGHT. For he says—"Yet, to secure to the supreme command an especial efficacy, and sacred respect, there is need of another additional principle besides the submission of the subject; and, therefore, he who affirms sovereignty to result immediately from compact, doth not in the least detract from the sacred character of civil government, or maintain that princes bear rule by human right, and not by divine." Indeed, he argues in favor of this divine right, that the establishment of civil government is necessary for the peace and safety of men; that the law of nature dictated such establishment. That, in pursuance of those laws, which could not otherwise among great multitudes be carried into effect, civil government had been founded. That God, who imposed the law of nature on the human race, thereby *commanded* the establishment of civil societies, so far as they serve as instruments and means of improving and enforcing these laws." Grotius too, who was a citizen of the United Provinces of the Netherlands, and who lived in the enjoyment of a republican government, although he considered all governments in their formation as human institutions, he also

on the other hand, maintained the opinion that the divine right of sovereignty, and the sacred character of government, were necessary to give it efficacy.

§ 124. Domat seems not to have questioned the doctrine of sovereignty by divine right, although he builds upon this foundation a very strong argument in favor of the doctrine, that there are of necessity certain limits within which the sovereign power should be exercised. In treating of government he says: "Although every state hath its peculiar manner of government, and there be in all states, some laws or usages, which distinguish the names, the number, and the *power* of those who are placed in the highest stations, yet there is this common to them all, that the general order is maintained in them by a supreme and sovereign power, whether it resides in one or many persons,(*a*) since the rights of sovereigns are derived to them by a consequence of the power which they hold of God, they can have no other rights but such as have in them nothing contrary to the use which God requires them to make of the said powers; and it is for this reason that he enjoins them to study his law, that they may learn both their *power* and their duty, of which the spirit of this divine law ought to be the rule.(*b*) He then defines the nature and objects of the exercise of this sovereignty: "That this sovereign power or authority, is the power of administering the government with the use of the authority and forces in which this power consists, by employing it for the *support of justice*, and the maintaining the public tranquility in the dominions committed to the sovereign care." According to this doctrine of Domat, the sovereign is to exercise the sovereign power with respect to the end to

(*a*) Domat's Pub. Law, b. 1, tit. 1.
(*b*) Ibid. b. 1, sec. 2.

be obtained, and that end is, the *protection* and *preservation* of the lives, rights and property of the citizens, and not to be exercised for the *destruction* of either: that is, the sovereign is to be a minister of God for *good*, and not for *evil*. The divine law which high authority pronounces wise, just and good, is to be the rule of his conduct, and prescribes the circle within which human sovereignty must move; that law being the embodiment of all perfection and justice, its spirit, as well as letter, denies the right of man to do an unjust act, or to infringe upon natural rights; sovereignty when exercised within these limits, cannot deserve the names of *arbitrary, absolute or despotic*, nor can it be justly considered as such.

If sovereigns only claimed to exercise their sovereign power in accordance with the principles of the divine law, instead of by "DIVINE RIGHT," there would be less disposition to controvert the right, and less reason for complaint for the manner in which it is exercised.

§ 125. It has been justly said, that both Puffendorf and Grotius being deeply imbued with the metaphysics of the schools, considered sovereignty as an entity, not a physical but a moral entity, capable of supporting attributes, and of subsisting in any government; but whatever the form of government, it was to be considered a unity.(*a*) Although the doctrine of sovereignty by divine right, may now be ranked among theories that once were; although none of the princes of modern Europe would now venture to rest their authority on this ground —and although the doctrine of abstract entities and their unities, has long since fallen to the ground and became obsolete; yet many of the terms which had their origin from these sources, are still in use. These terms have not unfrequently, for want of proper definitions, led to

(*a*) Chipman, 140.

erroneous conclusions; and, upon an erroneous application of them, it is more than probable that many, if not most of English writers have been under their influence, led to assign to, and vest in the Parliament of England the attributes of omnipotence in the scale of political existence. It has been supposed by most of them, that it is a settled principle of the law of England, that an act of parliament, delivered in clear and intelligible terms, cannot be questioned, or its authority controlled by any power on earth.

Sir William Blackstone says: "It is the exercise of the highest authority that the kingdom acknowledges upon earth." The doctrine has been laid down in several English authorities, that if a statute be against common right or reason, or repugnant, or impossible to be performed, the common law shall control it, and pronounce it void.(*a*) Although it is said that judges will not hold a statute void unless it be clearly contrary to natural equity. Chancellor Kent, however, says—"Where it is said that a statute contrary to natural equity, or reason, or repugnant, or impossible to be performed, the cases are understood to mean, that the court is to give them a reasonable construction. They will not readily presume, out of respect and duty to the law giver, that every unjust or absurd consequence was within the contemplation of the law; but if it should happen to be too palpable to meet with but one construction, there is no doubt in the English law of the binding efficacy of the statute."(*b*) In this view he is sustained by the weight of authority in England.

§ 126. Christian maintains the doctrine, that if an act of parliament is clearly and unequivocally expressed,

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(*a*) 8 Co. 118; 2 Inst. 527; Finch, 74; Hob. 87; 10 Mod. 115; 11 Co. 63; Bacon Ab. Stat. A.

(*b*) 1 Com. 408.

that it will be neither void in its direct or collateral consequences, however absurd or unreasonable they may appear.

If the expression will admit of a doubt, it will not then be presumed that the construction can be agreeable to the intention of the legislature, the consequences of which are unreasonable, but when the signification is manifest, no authority less than the parliament can restrain its operation." He admits, however, the omnipotence of parliament signifies nothing more than the supreme power of the state, or the power of action uncontrolled by any superior. In this sense, the king in the exercise of his prerogative, and the house of lords in the interpretation of laws, are also equally omnipotent; that is, free from the control of any superior provided by the constitution.(*a*)

Chipman, an American author, is of the opinion that neither the parliament, the house of lords, nor the king, are possessed of sovereign power; nor is it any where to be found but in a state of *absolute despotism*, in which all the powers of government are concentrated in a sole organ; and hence it merits all the epithets so fondly lavished upon it of—*absolute*, *uncontrollable*, *arbitrary*, *despotic*.(*b*)

§ 127. The power and jurisdiction of parliament, says Sir Edward Coke, is so transcendental and absolute that it cannot be controlled or confined, either for causes or persons, within any bounds. It has sovereign and uncontrollable authority in the making, confirming, enlarging, restricting, abrogating, repealing, renewing, and expounding all laws concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal; this being the place where that

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(*a*) 1 Com. 161. (*b*) Chip. 142.

absolute, despotic power, which must in all countries reside somewhere, is entrusted by the constitution of these kingdoms; all mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal, so that what the parliament doth, no authority on earth can undo."(*a*)

Another English author maintains the doctrine that the statutes of the realm, unless they are repugnant to the laws of God, all subjects are bound to obey. Created by an exercise of the highest authority which the constitution of the country acknowledges, they cannot be dispensed with, altered, amended, suspended, or repealed, but by the same authority of parliament by which they were made. For it is a maxim of the law, *conveniens naturali equitate unum quodcumque dissolvi eo ligamine quo ligatum est.*(*b*)

§ 128. Other writers maintain on the other hand, that there are boundaries set to the exercise even of the supreme sovereign power of the state; that it is limited in its exercise by the great and fundamental principles of the social compact, which is founded in consent, expressed or implied; that it shall be called into exercise only for the attainment of the great ends which that compact was designed to secure; and hence it cannot be converted into such an unlimited power as to defeat the end which mankind had in view when they entered into the social compact. Among this number are Vattel, and the celebrated John Locke. The former considers this question incidentally, in treating upon the extent of the power and sovereign authority of the prince. He maintains, that this power is derived from the nation, and is exactly equal to what they have entrusted him

(*a*) 1 Bl. Com. 160.
(*b*) Steph. Elec. Law, vol. i, p. 11.

with. If the nation have simply and strictly invested him with the sovereignty without limitation or division, he is supposed to be invested with all the prerogatives without which the sovereign command or authority could not be exerted in the manner most conducive to the public good. But that the sovereign power is limited and regulated by the fundamental law of the state, which show the extent and bounds of this power and the manner in which it ought to be exercised. The fundamental law being the plan by which the nation resolved to endeavor to obtain happiness, he is entrusted with the execution of it, and must religiously follow this plan, and regard it as an inviolable and sacred rule. The moment he departs from it, his commands are unjust, and become a criminal abuse of power from which no obligation to obedience can arise.(*a*)

In answer to the arguments of those who maintain, that if the prince is invested with the supreme command in a full and absolute manner, nobody has a right to resist him; that then the nation have no recourse left, but to suffer and obey with patience; that an absolute sovereign possesses completely, all the political authority of the society, no one can oppose him; if he abuses it, he does ill, and wounds his own conscience; yet, that his commands are not the less obligatory, as being founded in a lawful right to command; the nation by giving a lawful right to command, had reserved nothing to itself but to submit to his discretion: he replies, "Let us remember the essential ends of civil society. Is it not to labour in concert for the common happiness of all? Is it not with this view that every citizen strips himself of his rights, and resigns his liberty? Was it in the power of the society to make such use of its authority as to

(*a*) Vattel, b. 4, sec. 45, 46.

deliver up itself and all its members without relief to the discretion of a cruel tyrant? No, certainly not; since it had no right itself, if it was so disposed, to oppress a part of the citizens. When it therefore conferred the supreme and absolute government without an express reserve, it was necessarily with the tacit reserve that it should be used for the safety of the people, and not for their ruin."(*a*)

§ 129. Locke contends that the great end of man's entering into society being the enjoyment of property in peace and safety, and the great instrument and means of that, being the laws established in that society; the first and fundamental positive law is the establishing of the legislative power; the first and fundamental natural law, which is to govern the legislature itself, is the *preservation* of the society, and so far as consistent with the public good, every person in it. While, on the one hand, he concedes the doctrine that the legislative power is not only the supreme power of the commonwealth, but sacred and unalterable in the hands where the community have placed it, the edict of any, in what form soever conceived, or by what power soever backed, can not have the force and obligation of a law without the sanction of the legislature which the public has chosen and appointed, and in whom the legislative power is invested by the consent of those for whom they are to legislate; on the other hand, he contends that though the legislative be the supreme power, it cannot possibly be absolutely arbitrary over the lives and fortunes of the people. For, it being but the joint power of every member of the society, given up to that person or assembly which is the legislative, it can be no more than those persons had in a state of nature before they entered into

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(*a*) Vattel, b. 1, ch. 4, sec. 51.

society and gave up their natural rights to the community; for nobody can transfer to another more power than he has in himself, and nobody has an *absolute, arbitrary* power over himself, or over any other, to *destroy* his own life, or to take away the life or property of another. A man cannot subject himself to the arbitrary power of another, and having in the state of nature no arbitrary power over the life, liberty, or possession of another; but only so much as the law of nature gave him for the *preservation* of himself and the rest of mankind. This is all that he doth or can give to the commonwealth, and by it to the legislative power; so that the legislature can have no more than this. Their power, in the utmost bounds of it, is limited to the public good of the society. It is a power that hath no other end but *preservation*, and therefore can never have right to *destroy*, enslave, or designedly to impoverish the subject. Thus, the law of nature stands as an eternal rule to all men, binding upon legislatures as well as others. The fundamental law of nature being the *preservation* of mankind, no human sanction can be valid or good against it. That the legislative or supreme authority cannot assume to itself a power to rule by temporary arbitrary decrees; but is bound to dispense justice, and to decide the rights of the subject, by promulgated standing laws, and known authorized judges. To avoid the inconveniences which disorder men's property in a state of nature, they unite in societies. The object of this union is, that they may have the united strength of the whole to *secure* and *defend their property*, and may have standing rules to bound it, by which every one may know what is his. It is to *this end* men give up their natural powers to society which puts the legislative powers into such hands as they think fit, *with this* TRUST, that they shall be governed by declared laws. Absolute arbitrary powers, or governing without settled standing laws, can

neither of them, consist with the ends of society and government; and men would not quit the freedom of a state of nature, and tie themselves up under a government, were it not to *preserve* their *lives*, *liberty*, and *fortunes*, by stated rules of right and property. It cannot be supposed that they should intend, had they the power to do so, to give any one or more an absolute, arbitrary power over their persons and estates! For this was to put themselves in a worse condition than a state of nature, wherein they had a liberty to defend their rights against the injuries of others, and were upon equal terms.

Whereas, by supposing they have given up themselves to the absolute, arbitrary power of the legislator, they have disarmed themselves, and armed him to make a prey of them when he pleases. That the supreme power cannot take from any man his property without his own consent. For the preservation of property being the end of government, and that for which men enter into society, it necessarily supposes and requires, that the people should have property and be protected in it, without which they must be supposed to *lose*, by entering into society, the *very thing* which was the *end* and *design* of the social compact to secure, and for the attainment of which they entered into it. If this position be true, it was fallacious to think that the supreme or legislative power of any commonwealth can do what it will, irrespective of the principles of natural justice, or dispose of the estates of the subjects arbitrarily, or divest vested rights at pleasure.(*a*)

§ 130. Robert Hall, speaking of the extent of the rights which mankind surrender up to government upon entering into civil society, says:

(*a*) Locke's Works, vol. v., ch. 11, p. 416.

"That there are *natural rights*, or in other words a certain liberty which men may exercise, independent of permission from society, can scarcely be doubted by those who comprehend the meaning of the terms. Every man must have a natural right to use his limbs in what manner he pleases that is not injurious to another. In like manner he must have a right to worship God after the mode he thinks acceptable; or in other words, he ought not to be compelled to consult any thing but his own conscience. These are a specimen of those rights which may properly be termed *natural;* for, as philosophers speak of the primary qualities of matter, they cannot be increased or diminished. We cannot conceive the right of using our limbs to be created by society, or to be rendered more complete by any human agreement or compact.

"But there still remains a question, whether this natural liberty must not be considered as entirely relinquished when we become members of society. It is pretended, that the moment we quit a state of *nature*, as we have given up the control of our actions in return for the superior advantages of law and government, we can never appeal again to any original principles, but must rest content with the advantages that are secured by the terms of the society. These are the views which distinguish the political writings of Mr. Burke, an author whose splendid and unequalled powers have given a vogue and fashion to certain tenets which from any other pen would have appeared abject and contemptible. In the field of reason the encounter would not be difficult, but who can withstand the fascination and magic of his eloquence? The excursions of his genius are immense. His imperial fancy has laid all nature under tribute, and has collected riches from every scene of the creation and every walk of art. His eulogium on the Queen of France is a masterpiece of pathetic composition; so

elect are its images, so fraught with tenderness, and so rich with colours "dipt in heaven," that he who can read it without rapture may have merit as a reasoner, but must resign all pretensions to taste and sensibility. His imagination is, in truth, only too prolific; a world of itself, where he dwells in the midst of chimerical alarms, is the dupe of his own enchantments, and starts, like Prospero, at the spectres of his own creation.

"His intellectual views in general, however, are wide and variegated, rather than distinct; and the light he has let in on the British constitution in particular, resembles the coloured effulgence of a painted medium, a kind of mimic twilight, solemn and soothing to the senses, but better fitted for ornament than use.

'(As government implies restraint, it is plain a portion of our freedom is given up by entering into it); the only question can then be, how far this resignation extends, —whether to a part, or to the whole? This point may, perhaps, be determined by the following reflections:

"The advantages that civil power can procure to a community are *partial*. A small part, in comparison of the condition of man, can fall within its influence. Allowing it to be a rational institution, it must have that end in view which a reasonable man would propose by appointing it; nor can it imply any greater sacrifice than is strictly necessary to its attainment. But on what account is it requisite to unite in political society? Plainly to guard against the injury of others; for, were there no injustice among mankind, no protection would be needed; no *public force* necessary; every man might be left without restraint or control. The attainment of all possible good, then, is *not* the purpose of laws, but to secure us from external injury and violence; and as the means must be proportioned to the end, it is absurd to suppose that, by submitting to civil power, with a view to some *particular* benefits, we should be understood to

hold all our advantages dependent upon that authority. Civil restraints imply nothing more than a surrender of our liberty in some points, in order to maintain it undisturbed in others of more importance. Thus we give up the liberty by repelling force by force, in return for a more equal administration of justice than private resentment would permit. But there are some rights which cannot with any propriety be yielded up to human authority, because they are perfectly consistent with every benefit its appointment can procure. The free use of our faculties in distinguishing truth from falsehood, the exertion of corporeal powers without injury to others, the choice of a religion and worship, are branches of natural freedom which no government can justly alter or diminish, because their restraint cannot conduce to that security which is its proper object. Government, like every other contrivance, has a *specific* end; it implies the resignation of just as much liberty as is needful to attain it; whatever is demanded more is superfluous, a species of tyranny which ought to be corrected by withdrawing it. The relation of master and servant, of pupil and instructor, of the respective members of a family to their head, all include some restraint, some abridgment of natural liberty. But in these cases, it is not pretended that the surrender is total; and why should this be supposed to take place in political society, which is *one* of the relations of human life? this would be to render the foundation infinitely broader than the superstructure.

"From the notion that political society precludes an appeal to natural rights, the greatest absurdities must ensue. If that idea be just, it is improper to say of any administration that it is despotic or oppressive, unless it has receded from its first form and model. Civil power can never exceed its limits, until it deviates into a new track. For, if every portion of natural freedom be given up by yielding to civil authority, we can

never claim any other liberties than those precise ones which were ascertained in its first formation. The vassals of despotism may complain, perhaps, of the hardships which they suffer, but, unless it appear they are of *a new kind*, no injury is done them, for no right is violated. Rights are either natural or artificial; the first cannot be pleaded after they are relinquished, and the second cannot be impaired but by a departure from ancient precedents. If a man should be unfortunate enough to live under the dominion of a prince, who, like the monarchs of Persia, could murder his subjects at will, he may be unhappy, but cannot complain; for, on Mr. Hey's theory, he never had any rights but what were created by society, and on Mr. Burke's he has for ever relinquished them. The claims of *nature* being set aside, and the constitution of the government despotic from the beginning, his misery involves no injustice, and admits of no remedy. It requires little discernment to see that this theory rivets the chains of despotism, and shuts out from the political world the smallest glimpse of emancipation or improvement. Its language is, he that is a slave, let him be a slave still.

"It is incumbent on Mr. Burke and his followers to ascertain the *time* when natural rights are relinquished. Mr. Hey is content with tracing their existence to society, while Mr. Burke, the more moderate of the two, admitting their foundation in nature, only contends that regular government absorbs and swallows them up, bestowing artificial advantages in exchange. But at what period, it may be inquired, shall we date this wonderful revolution in the social condition of man? If we say it was as early as the first dawn of society, natural liberty had never any existence at all, since there are no traces even in tradition, of a period when men were utterly unconnected with each other. If we say this complete surrender took place with the first rudiments of law and

government in every particular community on what principle were subsequent improvements introduced? Mr. Burke is fond of resting our liberties on Magna Charta and the Bill of Rights; but he ought to remember that as they do not carry us to the commencement of our government, which was established ages before, our forefathers had long ago resigned their natural liberty. If those famous stipulations only recognized such privileges as were in force before, they have no claim to be considered as the foundations of our constitution; but if they formed an *æra* in the annals of freedom, they must have been erected on the basis of those natural rights which Mr. Burke ridicules and explodes. When our ancestors made those demands, it is evident they did not suppose an appeal to the rights of nature precluded. Every step a civilized nation can take towards a more equal administration, is either an assertion of its natural liberty, or a criminal encroachment on just authority. The influence of government on the stock of natural rights may be compared to that of a manufactory on the rude produce; it adds nothing to its quantity, but only qualifies and fits it for use. Political arrangement is more or less perfect in proportion as it enables us to exert our natural liberty to the greatest advantage; if it is diverted to any other purpose, it is made the instrument of gratifying the passions of a few, or imposes greater restraint than its object prescribes; it degenerates into tyranny and oppression.

"The confused mixture of liberty and oppression which ran through the feudal system prevented the theory of government from being closely inspected: particular rights were secured; but the relation of the people to their rulers was never explained on its just principles, till the transfer of superstition to civil power shocked the common sense of mankind, and awakened their inquiries. They drew aside the veil, and where

they were taught to expect a mystery they discerned a fraud. There is, however, no room to apprehend any evil from political investigation, that will not be greatly overbalanced by its advantages. For, besides that truth is always beneficial, tame submission to usurped power has hitherto been the malady of human nature. The dispersed situation of mankind, their indolence and inattention, and the opposition of their passions and interests, are circumstances which render it extremely difficult for them to combine in resisting tyranny with success. In the field of government, as in that of the world, *the tares of despotism were sown while men slept!* The necessity of regular government, under some form or other, is so pressing, that the evil of anarchy is of short duration. Rapid, violent, destructive in its course, it is an inundation which, fed by no constant spring, soon dries up and disappears. The misfortune on these occasions is, that the people for want of understanding the principles of liberty, seldom reach the true source of their misery; but, after committing a thousand barbarities, only change their masters, when they should change their system."

§ 131. It is undoubtedly true, that the Parliament of England, notwithstanding the doctrine of its omnipotence, certainly in modern times has been greatly restrained by the force of public opinion from interfering with or divesting vested rights. It has not, in fact, dissolved in an arbitrary manner any corporation, since the instance of the suppression of the order of Knight Templars in the time of Edward II., which was in the early part of the 14th century; and of the religious houses in the reign of Henry VIII.; so that the doctrine that the power of the parliament is omnipotent, may at this time be considered as resting mainly on theory.(*a*) When

(*a*) 9 Gill. & John. 409.

in 1783, a bill was introduced into parliament by Mr. Fox, for the purpose of annulling the charter of the East India Company, it was successfully resisted by Mr. Pitt, Lord Thurlow and others, as being subversive of the law and constitution of the country; mainly on the ground that the act was a tyrannical one, which broke through every rule of British justice; being an attack upon a most solemn charter, affirmed and confirmed by the sacred faith of parliament. It broke through all those ties which bind man to man; was fraught with the most pointed mischief against national honor and legislative integrity, and its passage would take away all security to individuals that private property would not be destroyed by legislative tyranny.

Mr. Burke, although he advocated the passage of the bill, conceded the rights of man, that is to say, the *natural rights* of mankind, were indeed sacred things, and if any public measure was proved mischievously to affect them, the objection ought to be fatal to that measure, even if no charter at all could be set up against them. If these natural rights were further affirmed and declared by express covenant; if they are clearly defined and secured against chicane, against power and authority, by written instruments and positive engagements, they were in still better condition; they partook not only of the sanctity of the object so secured, but of that solemn public faith itself which secures an object of such importance. Such a formal recognition by the sovereign power of an original right in the subject, could never be subverted but by rooting up the radical principles of government, and even of society itself. He conceded that the great charters of King John and Henry III., were instances of this nature; things secured by these instruments might be called the chartered rights of men. He however drew this distinction between magna charta and the charter of this company; the former was to

restrain power and to *destroy monopoly;* the latter to *establish monopoly* and *create power*. That *political power* and *commercial monopoly* were not the rights of men; it was fallacious to call them such; for their effect was to suspend the natural rights of men.

He attempted to obviate the objection by drawing a distinction between a grant of mere *political power*, to be exercised for *public purposes*, which were wholly artificial and in derogation of the natural equality of mankind, and the natural inherent right of the subject which, from its nature, was sacred and inviolable, because they were self-derived rights, vested in men for the benefit of themselves, whereas political power was not self-derived, nor were they granted for the benefit of the holder, but were to be exercised for the benefit of the body politic, and were, in the strictest sense, a trust to be rendered accountable to the government, and even totally to cease when substantially varied from the purposes for which alone they could have ever had a lawful existence.(*a*)

§ 132. The necessity for a resort to this specious argument by this master spirit of his age, to obviate the objections to this bill, shows, that parliament itself dare not now exercise its sovereignty irrespective of the fundamental principles of natural justice, or in contravention of the great ends of the civil compact. Although the check of public opinion arising from the nature of the English constitution is, at most, a mere moral one, yet it is one which acts, not only on the legislative, but also upon every department of the goverment with a force which is at all times felt, and not unfrequently, as in this instance, becomes an irresistible one. Who can fail, from this fact, to discover the potency of public opinion, the importance of having that opinion deeply embued

(*a*) Parl. Hist. vol. xxxiii. 315.

with religious and moral truths, with a prevailing sense of natural justice. For there is a power in moral principle which, is more energetic and influential in restraining legislative tyranny, than all the restraints which are derived from restrictions contained in a written constitution. For without moral principle going *pari passu* with such written restrictions, or even in advance of them, such restrictions would too often prove a mere cobweb barrier against legislative aggression upon private rights and public property. Indeed it is very much doubted whether any written restrictions contained in the fundamental law of a nation, however imperative in their nature or comprehensive and explicit in their terms, or however sacred might be the rights which it was their design to protect, would have any potency or afford any protection against legislative usurpation under a government where the influence of moral principles were unfelt, or amid a population whose minds and hearts heeded not the dictates of a pure and ennobling system of morality. That, aided and fostered by religion and the light of revelation, is well calculated to instil reverence for private right, and constitutes the only sure basis upon which the fundamental law of a nation can safely rest, and is more potent and effective to secure and render sacred rights of property and of person than even the mandates of a fundamental law of a nation.

§ 133. Thus far we have, in the prosecution of the inquiry as to the extent of legislative power, and of the controlling force of statutes, been confined almost exclusively to the reasonings and opinions of ethical and judicial writers in Europe. It remains to be considered what are the opinions upon these questions entertained by the judicial tribunals of our own country. Whether the weight of authority in this country sustains the English doctrine will be most satisfactorily ascertained by a minute reference to the discussions and opinions which

have been elicited whenever this question has incidentally come under consideration in courts of justice. Certain it is there are those in this country who hold to the English doctrine, that legislation, being the exercise of sovereign authority, high and important duties are necessarily vested in the legislative body, whose acts, under a government which has no written constitution restricting it in the exercise of its functions, are irresistible and subject to no control, believing as they do that such is the weight of authority in England.(*a*)

§ 134. There are other authorities which, though they admit the doctrine of the English law, that an act of parliament is transcendental in its character, however unreasonable, but declare in favor of the opinion that this doctrine is not admissible in this country to the same extent to which it has been carried in England. That under our improved system of government the legislative power is limited by constitutional restrictions, but that in all other respects it must be considered as the sovereign and absolute power of the state, which can only be controlled by an impossibility. If the legislature, acting on a subject within its limits, should, through misrepresentation or other cause, do injustice to an individual there is no court that can apply a remedy or administer relief.(*b*)

The case of *Bennet* v. *Boggs*,(*c*) was one involving an act of the legislature of New Jersey, regulating the fisheries in the Delaware River. Mr. Justice Baldwin held that the court, in determining what is the law of New Jersey, must first look at the constitution, which was the supreme law, binding on the legislature itself; if that contained any restraint on the legislative power over fisheries, its obligations were paramount, but if it contained none, the law which must govern their decisions

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(*a*) 2 Dallas, 304.

(*b*) See 1 Nott & M'Cord's Rep. 401.

(*c*) 1 Baldwin's Rep. 74.

exists only in the acts of the government organized by the people under their constitution. That they found its powers plenary and unrestrained which embraced the case submitted. He said, "We may think the power conferred by the constitution of this state too great or dangerous to the rights of the people, and that limitations are necessary, but we cannot affix them or act in cases arising under state laws, as if limitations had been affixed by the constitution previously. We cannot declare a legislative act void because it conflicts with our opinion of policy, expediency or justice. We are not guardians of the rights of the people of the state, unless they are secured by some constitutional provision which comes within our judicial cognizance." The difficulty in the mind of Mr. Justice Baldwin, as above expressed, would seem to arise rather from the nature of the judicial powers of the United States Court, when passing upon questions arising under state laws, which, doubtless, in his mind, would be viewed in a far different light were he sitting as judge in a state court. Yet it would seem from his subsequent remarks, that he must have entertained doubts whether any judicial tribunal, however constituted, could apply a remedy for unjust and oppressive legislation, for he says: "The remedy for unwise or oppressive legislation within constitutional bounds is by an appeal to the justice and patriotism of the representatives of the people. If these fail, the people in their sovereign capacity can correct the evil, but courts cannot assume their rights. There is no paramount and supreme law which defines the laws of nature or settles those great principles of legislation which are said to control state legislatures in the exercise of the powers conferred on them in the constitution.

If it is once admitted that there exists in this court a power to declare a state law void, which conflicts with no constitutional provision; if we assume the right to

annul them for their supposed injustice, or oppressive operation, we become the makers and not the expounders of the constitution. Our opinions would not be a judgment on what was the pre-existing law of the case, but upon what it is after we have so amended or modified it as to meet our ideas of justice, policy and wise legislation, by a direct usurpation of legislative power and a flagrant violation of the duty enjoined upon us by the judiciary act.

In *Bradde* v. *Bramfield*,(*a*) Huston, Justice, held, there was high authority for saying there is in every government, somewhere, an absolute and despotic power. The exceptions to this are only such as are expressly specified in the written constitution, subject to this (the constitution) and only to this or some provisions of the constitution of the United States, the powers of the legislature of the state seem not to be limited, that is the power to enact laws.

In *Harvey* v. *Thomas*,(*b*) Gibson, Chief Justice, after stating that the most material point in this case was that which involves the constitutionality of the statute in relation to private roads, on which the defendant's right was founded and that the argument of the defendant was that the legislature had not the power to authorize the application of another's property to a private purpose, even on compensation made, uses the following language: "But who can point out any express constitutional disfirmance of it? The clause by which it is declared that no man's property shall be taken or applied to public use without the consent of the representative and without just compensation made, is a disabling and not an enabling one, and would have existed in full force without.(*c*)

(*a*) 2 Serg. & Watts' Rep. 285.
(*b*) 10 Watts' Rep. 66.
(*c*) See also 2 Watts & Serg. Rep. 323.

Whether this power was only partially restrained for a reason similar to that which induced an ancient law-giver to annex no penalty to parricide, or whether it was thought that there would be no temptation to the act of taking the property of one individual for another's use, it seems clear there is nothing in the constitution to prevent it, and the practice of the legislature has been in accordance with the principle here stated; of which the application of another's land for the purpose of a private way is a frequent proof. Chancellor Kent(*a*) says, the principle in the English government that the parliament is omnipotent does not prevail in the United States, though if there is no constitutional objection to a statute it is with us as absolute and uncontrollable as laws flowing from the sovereign power under any form of government.

In the case of *Cochran* v. *Van Surlay*,(*b*) this question was considered by Senator Verplank. He controverted the position, "that acts of legislature contrary to first principles of right," are void, and denied the power of courts to *annul* an act of the legislature, by declaring it void on the assumed ground of its being contrary to natural equity. He insisted that such power could only be properly exercised when clearly derived from express constitutional provisions, (and those strictly construed,) limiting legislative power, and controlling the temporary will of a majority by a permanent and paramount law, *settled by the deliberate wisdom of the nation.*

He says: "It is difficult, upon any general principles, to limit the omnipotence of the sovereign legislative power, by judicial interposition, except so far as the express words of a written constitution give that authority. There are indeed many *dicta*, and some great

(*a*) 1 Kent's Com. 488.
(*b*) 20 Wen. 381.

authorities, holding that acts contrary to the first principles of right are void. The principle is unquestionably sound, as the governing rule of a legislature, in relation to its own acts, or even those of a preceding legislature. It also affords a safe rule of construction for courts, in the interpretation of laws admitting of any doubtful construction, to presume that the legislature could not have intended an unequal and unjust operation of its statutes. Such a construction ought never to be given to legislative language, if it be susceptible of any other, more conformable to justice; but if the words be positive and without ambiguity, I can find no authority for a court to vacate or repeal a statute on that ground alone. But it is only in express constitutional provisions, limiting legislative power and controlling the temporary will of a majority, by a permanent and paramount law, settled by the deliberate wisdom of the nation, that I can find a safe and solid ground for the authority of courts of justice to declare void any legislative enactment. Any assumption of authority beyond this, would be to place in the hands of a judiciary, powers too great and too undefined, either for its own security or the protection of private rights. It is, therefore, a most gratifying circumstance to the friends of regulated liberty, that in every change in their constitutional polity, which has yet taken place here, whilst political power has been more widely diffused among the people, stronger and better defined guards have been given to the rights of property. Thus in the constitution of the United States, the states have been inhibited from passing any law impairing the obligation of contracts, a power boldly, rashly and wantonly exercised under the old confederation. So again, in the constitution of our own state adopted in 1822, in addition to the general provision of the old constitution already quoted, "that no one shall be deprived of any of the rights or privileges secured to any citizen thereof,

unless by the law of the land or the judgment of his peers," farther protection is given to property, by adding a prohibition against "the taking private property for public use without just compensation," and also another against "the depriving any one of life, liberty or property, without due process of law;" *i. e.* by mere arbitrary legislation, under whatever pretext of private or of public good.

Believing that we are to rely upon these and similar provisions as the best safeguards of our rights, as well as the safest authorities for judicial direction, I cannot bring myself to approve of the power of courts to annul any law solemnly passed, either on an assumed ground of its being contrary to natural equity, or from a broad, loose and vague interpretation of a constitutional provision, beyond its natural and obvious sense. There is no provision of the old state constitution, that, in my understanding of it, so limits the power of the legislature over the property of its citizens, as to enable a court to set aside these statutes, or titles acquired under them, on the ground of unconstitutional enactment."

§ 135. This question was discussed by the Supreme Court of the United States in the case of *Calder* v. *Bull*,(*a*) when the learned judges of that court were not agreed in their opinions on this point.

On the one hand, Mr. Justice Chase avowed, that he could not submit to the omnipotence of the state legislature, or that it was absolute or without control, although its authority should not be expressly restrained by the constitution or fundamental law of the state. He held that the people of the United States erected their constitution and form of government to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from

(*a*) 3 Dallas R. 386.

violence. The purposes for which men enter into society determines the nature and terms of the social compact; as they are the foundation of legislative powers, they will decide what are the proper objects of it. The nature and extent of legislative power will limit the exercise of it.

This fundamental principle flows from the very nature of our free republican government, that no man shall be compelled to do what the law does not require, nor to refrain from acts which the law permits. There are acts which the state legislature cannot do without exceeding their authority. There are certain vital principles in our free republican government which will determine and overrule any apparent and flagrant abuse of legislative power; such, for instance, as authorized manifest injustice, or took away that security for personal liberty or private property, for the protection of which government was established. An act of the legislature, contrary to the great principles of the social compact could not be converted into a rightful exercise of legislative authority. The obligations of a government, established on express compact, and upon republican principles, must be determined by the nature of the powers on which it is founded. A law that punishes a citizen for an innocent action, or for an act which when done was in violation of no existing law, or one that impairs, or destroys lawful private contracts of citizens, or which makes a man judge in his own cause, or that takes the property of A and gives it to B, it is against all reason and justice for a people to intrust the legislature with such powers, therefore it cannot be presumed that they have done it. The genius—the nature, and the spirit of our state governments, amounts to a prohibition of such acts of legislation, and the general principles of law and reason forbid them. The legislature may enjoy, forbid,

and punish, they may declare new crimes, establish rules of conduct for all their citizens in future cases, they may command what is right, forbid what is wrong, but they cannot change innocence into guilt, or punish innocence as a crime, or violate the rights of lawful antecedent contract, or the right of private property; to maintain that our state or federal legislatures possess such a power, if they had not been expressly restrained, would be a political heresy, altogether inadmissible in a free republican government.

Mr. Justice Patterson held, that if a government, composed of legislative, executive, and judicial departments, were established by a constitution which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power could not interfere to pronounce it void. That it was true that some speculative spirit had held that a legislative act against natural justice must in itself be void, but that he could not think that under such a government any court of justice would possess the power to declare it so.

Mr. Justice Iredell was of the same opinion, and cited the strong case put by Sir William Blackstone, of an act of parliament which should authorize a man to try his own cause as judge, that even in that case there is no court that has the power to defeat the intent of the legislature when couched in such evident and express words as to leave no doubt whether it was the intention of the legislature, or no. In order to guard against so great an evil, it had been the policy of the American states, which had individually formed their state constitutions since the revolution, and of the people of the United States when they formed the federal constitution, to define with precision the object of legislative power, and to restrain its exercise into marked and settled boundaries. That

if the legislature of the Union, or the legislature of any member of the Union should pass a law within the general scope of their constitutional powers, the court could not pronounce it void merely because it was, in their judgment, contrary to the principles of natural justice. The ideas of natural justice were regulated by no fixed standard; the ablest and purest men have differed upon the subject.

All that the court could properly say in such an event would be, that the legislature (possessed of an equal right of opinion) had passed a law, which in the opinion of the judges was inconsistent with the abstract principles of natural justice. If the legislature pursue the authority delegated to them their acts are valid; if they transcend the bounds of that authority, their acts are invalid. In the former case, they exercise the discretion vested in them by the people, to whom they are responsible for the faithful discharge of their trust; but in the other case they violated the fundamental law which must be our guide whenever we are called upon as judges to determine the validity of legislative acts.

§ 136. It is with great deference suggested, unless we are to assume that at the time of the adoption of the federal and state constitutions, it was the universal law of the civilized world, recognized as such, that the legislative power was omnipotent, unlimited and supreme; and from hence infer, that it must be presumed the people entered into the national and state compacts in reference to such universal rule, or in reference to the doctrine as it was then understood to be settled by the common law of England, and that they then understood that the legislature would be without limitation and beyond control, under a government founded in express written compact, and that there would be no restriction unless it was embodied in the fundamental law, —does not the argument of Mr. Justice Iredell assume

what should be first otherwise established, that under our form of government, absolute power, except in so far as it was expressly restricted, was delegated by the people to the legislature, irrespective of the object and design of the social compact. For, unless it be assumed that the design and object of the social compact was to do that which is against reason and natural justice, it can hardly be presumed such an act is legitimately within the scope of the authority delegated to the legislative department. It would be assuming too much to suppose, that the people intended to delegate any power to be exercised *irrespective* of the original purpose of the social compact, or in a way which would be subversive of its object and design. The reasonable presumption would seem to be, that the authority delegated must from necessity, arising from the nature of that design, be limited in its exercise to such acts, and such only, as are calculated to effectuate the original purpose of the people when the government was founded. Whenever the legislature transcends the bounds of this original authority, or so far disregards the sacred trust committed to it, as to pass an act *subversive of natural right*, ought not such an act to be regarded as exceeding the authority delegated? and if so, must not the want of authority render such an act invalid, divest it of the attributes of an imperative authority? and would not the spirit and genius of our institutions under the press of such circumstances call for and justify the application of a more speedy remedy than the one open to them through the medium of the ballot boxes.

In *Fletcher* v. *Peck*, 6 Cranch, 87, Marshall, Chief Justice, adverted to this interesting and important question; although in that case it did not become necessary to pass upon it, as the act then under consideration was declared void on the ground of its conflict with the constitution of the United States. It divested estates vested

under a prior act, and hence impaired the obligation of a contract. In the consideration of that question he says: "Is the power of the legislature competent to the annihilation of such title, and to a usurpation of the property thus held? The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation can never be controverted. But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made; those conveyances have vested legal estates; and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact.

"When, then, a law is in its nature a contract; when absolute rights have vested under that contract; a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.

"It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?

"To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection."

Mr. Justice Patterson also, in another case, in which this precise question, it is true, does not arise, as the

case was decided on a constitutional question, makes the following remarks:

"Men have a sense of property; property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects that induced them to unite in society. No man would become a member of a community in which he could not enjoy the fruits of his honest labor and industry. The preservation of property then is a primary object of the social compact, and, by the late constitution of Pennsylvania, was made a fundamental law. Every person ought to contribute his proportion for public purposes and public exigencies; but no one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompense in value. This would be laying a burden upon an individual, which ought to be sustained by the society at large. The English history does not furnish an instance of the kind; the parliament, with all their boasted omnipotence, never committed such an outrage on private property; and if they had, it would have served only to display the dangerous nature of unlimited authority; it would have been an exercise of power and not of right. Such an act would be a monster in legislation, and shock all mankind. The legislature, therefore, had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without a just compensation. It is inconsistent with the principles of reason, justice, and moral rectitude; it is incompatible with the comfort, peace, and happiness of mankind; it is contrary to the principles of social alliance in every free government; and lastly, it is contrary both to the letter and spirit of the constitution. In short, it is what every one would think unreasonable and unjust in his own case. The next step in the line of progression is, whether the legislature had authority to make an act,

divesting one citizen of his freehold and vesting it in another, even with compensation. That the legislature, on certain emergencies, had authority to exercise this high power, has been urged from the nature of the social compact, and from the words of the constitution, which says, that the house of representatives shall have all other powers necessary for the legislature of a free state or commonwealth; but they shall have no power to add to, alter, abolish, or infringe any part of this constitution. The course of reasoning, on the part of the defendant, may be comprised in a few words. The despotic power, as it is aptly called by some writers, of taking private property, when state necessity requires, exists in every government; the existence of such power is necessary; government could not subsist without it; and if this be the case, it cannot be lodged any where with so much safety as with the legislature. The presumption is, that they will not call it into exercise except in urgent cases, or cases of the first necessity. There is force in this reasoning. It is, however, difficult to form a case, in which the necessity of a state can be of such a nature, as to authorize or excuse the seizing of landed property belonging to one citizen, and giving it to another citizen. It is immaterial to the state, in which of its citizens the land is vested; but it is of primary importance, that, when vested, it should be secured, and the proprietor protected in the enjoyment of it."

Again, (on page 314,) he exclaims: "Shame to American legislation! That in England, a limited monarchy, where there is no written constitution, where the parliament is omnipotent, and can mould the constitution at pleasure, a more sacred regard should have been paid to property, than in America, surrounded as we are with a blaze of political illumination; where the legislatures are limited; where we have republican governments, and

written constitutions, by which the protection and enjoyment of property are rendered inviolable."

In another part of the same decision he adds: "Omnipotence in legislation is despotism. According to this doctrine, we have nothing that we can call our own, or are sure of for a moment; we are all tenants at will, and hold our landed property at the mere pleasure of the legislature. Wretched situation, precarious tenure! And yet we boast of property and its security, of laws, of courts, of constitutions, and call ourselves free!"

In the case of the *University of Maryland* v. *Williams*, which was a case involving the question, whether an act of the legislature of Maryland, which took away the vested rights of the regents, was void as being in conflict with the constitution of the United States; Chief Justice Buchanan, after deciding that it was, adds, "but the objection to the validity of the act of 1825 does not rest alone for support upon the construction of the constitution of the United States.

Independent of that instrument, and of any express restrictions in the constitution of the state, there is a fundamental principle of right and justice, inherent in the nature and spirit of the social compact, (in this country at least,) the character and genius of our government, the causes from which they spring, and the purposes for which they were established, that rises above and restrains, and sets bounds to the powers of legislation, *which the legislature cannot pass without exceeding its rightful authority.* It is that principle which protects the life, liberty, and property of the citizen from violation in the unjust exercise of legislative power. To say that the legislature possesses the power to pass capriciously, or at pleasure, a valid act, taking from one his property and giving it to another, would be in this age, and in this state, a startling proposition to which the assent of none could be yielded.

§ 137. In *Taylor* v. *Porter*,(*a*) which was a case involving the constitutionality of the provisions of the Revised Statutes of New York, authorizing a private road to be laid out over the lands of a person without his consent: Mr. Justice Bronson, after admitting the right to take private property for public use, making just compensation therefor, held; there was no provision in the constitution that just compensation should be made to the owner when his property is taken for private purposes. If the power exists to take the property of one man and transfer it to another, it may be exercised without any reference to compensation. The power of making bargains for individuals has not been delegated to any branch of the government, and if the title of A. can be without his fault transferred to B., it may as well be done without as with consideration. This view of the question was sufficient to put them on enquiring where can the power be found to pass such a law, as that under which the defendant attempted to justify? It is not to be presumed that such a power exists, and those who set it up should tell us where it may be found. Under our form of government, the legislature is not supreme. It is only one of the organs of that absolute sovereignty which resides in the whole body of the people; like other departments of government, it can only exercise such powers as have been delegated to it, and when it steps beyond that boundary, its acts, like those of the most humble magistrate in the state who transcends his jurisdiction, ARE UTTERLY VOID.

Where then shall we find a delegation of power to take the property of A. and give it to B., either with or without compensation?

Only one clause in the constitution can be cited in

(*a*) 4 Hill's N. Y. Rep. 146.

support of the power, and that is the first section of the first Article, where the people have declared that "The legislative power of the state shall be vested in a senate and assembly." He admitted that the two houses, subject only to the qualified negative of the Governor, possessed all "the legislative power of the state," but the question immediately presents itself, what is "legislative power," and how far does it extend? Does it reach the life, liberty, or property of the citizen who is not charged with a transgression of the laws; and where the sacrifice is not demanded by a just regard for the public welfare. The security of life, liberty and property, lies at the foundation of the social compact; and to say that this grant of "legislative power" includes the right to attack private property, is equivalent to saying that the people have delegated to their servants the power of defeating one of the great ends for which governments were established. If there was not one word of qualification in the whole instrument, he should feel great difficulty in bringing his mind to the conclusion, that the clause under consideration had clothed the legislature with despotic power; such is the extent of their authority, if they can take the property of A., either with or without compensation, and give it to B. "The legislative power of the state does not reach to such an unwarrantable extent —neither life, liberty, nor property, except when forfeited by crime, or when the latter is taken for public use, falls within the scope of this power."

§ 138. Tracy, Senator, in *Bloodgood* v. *The Mohawk and Hudson R. R. Co.*,(*a*) says:—"It has never been allowed to be a rightful attribute of sovereignty in any government professing to be founded upon fixed laws, however despotic the form of the government

(*a*) 18 Wend. 56.

might be, to take the property of one individual or subject, and bestow it upon another. The possession and exertion of such a power would be incompatible with the nature and object of all government; for it being admitted that a chief end for which government is instituted is, that every man may enjoy his own, it follows necessarily that the rightful exertion of a power by the government of taking arbitrarily from any man what is his own, for the purpose of giving it to another, would subvert the foundation principle upon which the government was organized, and resolve the political community into its original chaotic elements. This power, therefore, instead of being acknowledged, was expressly repudiated by the Roman law at the height of imperial despotism; so that even when the lives of subjects were wantonly sacrificed by thousands at the remorseless bidding of cruel and capricious tyrants, no idea seems to have been entertained that they could, except by the interposition of legal forms, transfer the property of one subject to another. Even Hobbes, the most ingenious of all advocates for the absolute powers of government, does not go further with his doctrine on this point than to say, that the property which a subject has in his goods, consists not in a right to exclude the sovereign from the use of them, but consists in a right to exclude all other subjects from the use of them. But no approved writer on public law will be found to go as far as Hobbes in vindicating the unqualified right of the sovereign, to assume at will the property of the subject. Every other writer is disposed to recognize a distinction between right and power as applied to sovereign and subject, and to acknowledge that a rightful government must be founded on some other principle than that of mere force. Hence an original compact, founded in the mutual necessities of the individuals about to constitute a political community, is implied in all cases, and the respective rights of sove-

reign and subject are referred to this supposed compact for their ascertainment. It follows, of course, that as the terms of this compact are capable of being shown only argumentatively, differences of opinion will exist in regard to them. To avoid this difficulty, is one great purpose of written constitutions. But though differences of opinion exist as to the extent of the principle of the inviolability of private property, the secure possession and undisturbed enjoyment of property by individuals, is universally admitted to be the great cement of the social compact, and every publicist therefore feels the necessity of prescribing some safe guards for it against the encroachments of the sovereign power."

§ 139. Chancellor Walworth has said, that the right of eminent domain, did not imply a right in the sovereign power to take the property of one citizen and transfer it to another when the public interest would be in no way promoted thereby, even if a full compensation for such property was awarded to the owner thereof. In the case of *Varick* v. *Smith*,(*a*) he says, "The principle upon which forced sales of private property were compelled by the civil law, for the public good, were certainly as extended as any government can ever claim consistently with the private rights of its citizens. And it is not pretended, that under the arbitrary government of the Roman emperors, it was lawful or justifiable for the sovereign to take the property of one citizen and give it to another where the public interest was not concerned in such transfer. Perhaps in England, where the parliament is said to be omnipotent, so far as the exercise of mere human power is concerned, there may be no remedy for such an abuse of power, where it is by a concurrent act of the three estates of the realm. But in

(*a*) 5 Paige R. 159.

a state which is governed by a written constitution like ours, if the legislature should so far forget its duty, and the natural rights of an individual, as to take his private property and transfer it to another, where there was no foundation for a pretence that the public was to be benefited thereby; I should not hesitate to declare such an abuse of the right of eminent domain was an infringement of the spirit of the constitution, and therefore not within the general powers delegated by the people to the legislature."

§ 140. While the learned chancellor denied to the legislative power the right thus to take private property for the mere purpose of transferring it to another, he admitted that the two branches of the legislature, subject only to the qualified veto of the executive, are the sole judges as to the expediency of making police regulations, interfering with the natural rights of our citizens, but which regulations are not prohibited by the constitution; and also as to the expediency of exercising the right of *eminent* domain, for the purpose of making public improvements, either for the benefit of the inhabitants of the state or any particular section thereof.

§ 141. This last sentence of the learned chancellor is a most unguarded one. We cannot assent to the doctrine here laid down; for, if it were to be admitted without qualification, we see no bounds which can be set to legislative tyranny and usurpation under such a rule as this, for while, on the one hand, it concedes that there is such a limit, yet, on the other, it permits the legislature to be the judge as to the expediency of the power *quoad hoc* which it shall exercise, and thus by such legislative determination elude any restriction upon that power. What is it but in effect to say to the legislature thus far shalt thou go and no farther, but you are to be the sole judges as to how far it is expedient that you should go; if,

therefore, you should determine that it is expedient to go farther, as you are the sole judges of that expediency, you may, with impunity, go just as far as you shall deem expedient; provided, nevertheless, you shall decide a given purpose to be public, and then shall act in reference to that purpose, although the purpose be one which relates to a fraction, however small, of the aggregate body politic.

§ 142. In thus dissenting from this part of the chancellor's reasoning we are fully sustained by the strong and forcible reasoning of Senator Tracy.(*a*) He there says: "The remark of an eminent jurist,(*b*) that 'it must undoubtedly rest in the wisdom of the legislature to determine when public uses require the assumption of private property; and if they should take it for a purpose not of a public nature, as if the legislature should take the property of A and give it to B, the law would be unconstitutional and void,' is correct, if intended to concede to the legislature merely the power of determining what property in a particular case shall be taken for the public use, but it cannot be correct, if intended to concede to the legislature the power of determining what constitutes a public use of private property; and therefore I must dissent from the position taken by the chancellor in *Beekman* v. *Saratoga and Schenectady Rail Road Company*, where he says: 'If the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient to exercise the right of eminent domain, and to authorize an interference with the private rights of individuals.' This position, it will be seen, disregards the distinction be-

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(*a*) 18 Wend. 161. (*b*) 2 Kent's Com. 340.

tween a public use and a public interest in a particular use of private property, and confers on the legislature the right of determining, first, that the public interest will be promoted by the particular use of private property; and next, because the public interest will be promoted by such use, that therefore it is a public use; and finally, it being a public use, it becomes a mere question of expediency with the legislature whether they shall authorize private property to be taken to subserve it or not. It seems to me that such a construction of legislative power is inconsistent with the secure possession and enjoyment of private property, and repugnant to the language and object of the constitutional provision. Indeed it concedes to legislative discretion a wider range than I think could be maintained for it on the principles of natural law, if we had no written constitution.

"It is not denied that the legislature is the most appropriate organ of the sovereignty of the state for exercising the right of eminent domain, but they can only exercise the right or power in subordination to the constitutional authority; which authority they cannot enlarge or modify. The condition that the property must be taken for public use is as much above their reach and control as it is above the reach and control of the lowest functionary of the government, who, like them may have occasion to invoke this attribute of sovereignty in an emergency of some humble department of the public service, with which he may have been charged. The legislature may fitly determine when and under what circumstances—as to the mode of taking—private property shall be taken for the public use. But it by no means follows, as seems to have been supposed, that the legislature can determine that a particular use is a public use of private property, within the meaning of the constitution. The nature of the use to which the legislature may dedicate the property of a citizen, is not established

by the name which they give to it, but is an inherent and inseparable quality or characteristic which cannot be changed, however it be denominated. Much less are we to confound the notion of legislative discretion with that of sovereign power. The legislature is not the sovereignty of the state, but only one of the organs of the sovereignty, and a restricted organ in regard to all matters prescribed by the constitution, and necessarily, therefore, cannot exercise any power which by the fundamental compact is prohibited to the sovereignty. It is prohibited to the government of the state, even in its sovereign capacity, to take private property except for public use; consequently it is not in the power of the legislature to authorise private property to be taken for any other purpose. Nor can this restriction, which is upon both the government, as a sovereignty, and upon the legislature, as its organ, be evaded, or the power which it limits be extended, under whatever form or by whatever name it may be attempted. If it be called the right of eminent domain, or of supereminent dominion, it comes to the same result, for these are only other names for sovereign power, and are equally included and controlled by the constitutional restriction. Therefore, to insist that the determination or expression by the legislature that it is for the public interest and expedient in a particular case to exert the right of eminent domain, or the power of sovereignty, *ipso facto*, establishes that the power of sovereignty is rightfully exerted, is in effect to insist that the power of the legislature is above the power of the constitution, and to prove that instead of possessing a government of defined and limited powers, we have one with powers more extensive and irresponsible than those of the regal governments of Europe. But happily for us, this is not so, the legislature is not the creator or judge of its own powers; but is the creature of the constitution, and all its acts must be in sub-

ordination to it. In the examination, therefore, of a question involving the construction of constitutional powers, courts are to be guided by the constitution itself, and are not to be controlled by the acts of the legislature, or to be further influenced by them than a due respect for the apparent opinions of a co-ordinate branch of the government may demand. Conceding freely to the legislature the right of appropriating private property to the public use, but denying confidently to it the power of making that a public use which in its nature is not."

§ 143. In the case of *Goshen* v. *Stonington*,(*a*) Hosmer, J., dissented from the opinion of those who assert the omnipotence of the legislature in all cases, where the constitution has not imposed an explicit restraint. He held, if there should exist a case of direct infraction of vested rights, too palpable to be questioned, and too unjust to admit of vindication, he could not avoid considering it a violation of the social compact, and within the control of the judiciary. He asked the question—If a law were made, without any cause, to deprive a person of his property, or to subject him to imprisonment, who would not question its legality, or who would carry it into effect?

§ 144. The case of *Wilkinson* v. *Leland*, in the U. S. Court,(*b*) was an action of ejectment by the heirs at law of Cynthia Jenks, to whom her father by his will in 1787 devised the premises in question in fee, subject to a life estate then in being, but which expired in 1794. The testator appointed his wife Cynthia his executrix. He died in New Hampshire, and his widow proved his will in the court of probates in that state, and took letters of administration. The estate being represented as insolvent, the executrix in 1790 obtained an order from the

(*a*) 4 Conn. R. 225. (*b*) 2 Peters' Rep. 654.

judge of probates in New Hampshire to sell so much of the real estate of the testator as should, with the personal estate, be sufficient to pay his debts. The premises in question were situate in the state of Rhode Island; the will was never proved in that state nor administration taken out there. In 1791 the executrix sold the premises to certain persons under whom the defendant claimed by a deed which recited her authority to sell, and in which she purported to act as executrix in the sale. She entered into a covenant with the purchaser to procure an act of the legislature of Rhode Island ratifying and confirming the title granted. She accordingly made an application to the legislature of Rhode Island for that purpose, stating these facts in her petition, and thereupon an act was passed by the legislature in June, 1792, granting the prayer of the petition, and ratifying the title.

The validity and effect of this act was the main question in this cause. Mr. Webster, as counsel, on the argument contended that it was of no importance to the question before the court, whether there were any restrictions or limitations to the power of the legislature of Rhode Island imposed by the constitution; for, if at this period there was not a general restraint on legislative power, there was an end of private property. He insisted though there were no prohibitions in the constitution, the legislature were restrained from committing flagrant acts, from acts subverting the great principles of republican liberty and of the social compact, such as giving the property of A. to B. Mr. Justice Story, who delivered the opinion of the court, stated that the objections taken by the defendant's counsel to this act are, in the first place, that it is void as an act of legislation, because it transcends the authority which the legislature of Rhode Island can rightfully exercise.

He admitted that the objection must be decided not upon principles of public policy, but of power, precisely

as the state of Rhode Island ought to decide it. He then stated that Rhode Island was the only state in the Union which had not a written constitution of government, containing its fundamental laws and institutions. Until the revolution in 1776, it was governed by the charter granted by Charles II., in the fifteenth year of his reign, (1664.) This charter had ever since continued, in its general provisions, to regulate the exercise and the distribution of the powers of government. It had never been formally abrogated by the people; and except so far as it had been modified to meet the exigencies of the Revolution, it might be considered now as a fundamental law. By this charter, the power to make laws was granted to the general assembly, in the most ample manner. What was the extent of the power thus granted, must be opened to explanation as well by usage, as by the construction of the terms in which it is given. He held that in a government professing to regard the great rights of personal liberty and of property, and which, like this, was required to legislate in subordination to the general laws of England, it would not slightly be presumed that the general principles of magna charta were to be disregarded, or that the estates of its subjects were to be taken away without trial, without notice, and without offence; even if such authority could be deemed to have been confided by the charter to the general assembly of Rhode Island, as an exercise of transcendental sovereignty before the Revolution, it could scarcely be imagined that that great event could have left the people of that state subject to its uncontrolled and arbitrary exercise. He was of the opinion that government could scarcely be deemed free, where the rights of property were left solely dependent upon the will of the legislative body, without any restraint. The fundamental maxims of a free government, seemed to require that the rights of personal liberty and private property should be

held sacred; at least that no court of justice in this country could be warranted in assuming, that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being, without very strong and direct expressions of intentions. That in *Terrett* v. *Taylor*,(*a*) it had been held by the court, that a grant or title to lands once made by the legislature to any person or corporation was irrevocable, and could not be resumed by any subsequent legislative act; that a different doctrine would be utterly inconsistent with the great principles of a republican government, and with the rights of the citizens to the free enjoyment of their property lawfully acquired. He then adds:—"We know of no case in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the Union. On the contrary, it has been constantly resisted as inconsistent with just principles, by any political tribunal in which it has been attempted to be enforced. We are not prepared, therefore, to admit that the people of Rhode Island have ever delegated to their legislature the power to divest the vested rights of property, and transfer them without the assent of the parties."

§ 145. The Supreme Court of South Carolina, in *Bowman* v. *Middleton*,(*b*) set aside an act of the colony legislature, as being against common right and the principles of magna charta, on the ground that it took away the freehold of one man and vested it in

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(*a*) 9 Cranch, 43. (*b*) 1 Bay's R. 252.

another, without any compensation, or any previous attempt to determine the right. They declared the act to be IPSO FACTO VOID; and in another case they held that a statute, framed against common right and common reason, was so far void as it was calculated to operate against those principles; but said, that the court would not do the legislature the injustice to say that such was their intention, and would therefore give it such a construction as would be consistent with natural justice and the dictates of natural reason, though such construction might be contrary to the letter of the statute.

§ 146. In the case of *Bonaparte* v. *The Camden and Amboy Rail Road Company*,(*a*) Baldwin, Justice, held that the legislature had not the power to take the property of a man for private purposes, without his consent. That if a law was clearly open to that objection, it would be a fatal one, as it was opposed to every constitutional principle which protects the right of property.

§ 147. In 1844, the then attorney general of this state, in a case referred to him by the senate,(*b*) says: "Even were it assumed that the act then under consideration would not be in direct conflict with any constitutional inhibition upon legislative authority, inasmuch as the grantor has never yielded his assent thereto, in this country at least, where the legislative authority, independent of the constitution, cannot be regarded as omnipotent, it is not competent for the legislature to invade the sanctuary of private right, for purposes no way connected with the public exigencies or to transfer the property of one citizen to another without his assent, either with or without just compensation, and he held it at least questionable, whether the legislature, irrespective of the constitution, could by legislative enactment clothe trustees charged with a

(*a*) 1 Baldw. C. C R. 223. (*b*) Senate Document No. 115.

trust under a deed with power to convey the premises described therein, discharged of the trust created by and contained in the deed of their grantor." In Assembly Document, No. 48, he says: "The legislature, independent of any constitutional restriction, are undoubtedly vested with all the legislative power possessed by the people themselves, and may exercise the same in any manner consistent with the principles of *natural justice*, as amply as the same could be exercised by those from whom this power itself is derived." It is evident that he was of the opinion that the legislature were to confine their action within the principles of natural justice.

§ 148. We have thus far endeavored to bring together the cases and opinions in England and America which have fallen under our observation on a very limited research, which have a bearing upon this most important and interesting question; in view of which, we are justified in the remark, that in this country the weight of authority seems to preponderate the scale in favor of the doctrine that there are restrictions upon the legislative power, growing out of the nature of the civil compact, and the natural rights of men, independent of any written constitutional restrictions and certain limits fixed, beyond which that power cannot be lawfully called into exercise. In a case where it should be manifest that these limits had been passed, that a legislative act if sanctioned and carried into effect would subvert the very foundations of the civil compact, and natural right, would take away without cause and for no offence the liberty of the subject, that our courts would not aid in carrying such an act of the legislature into effect, but would declare it to be void. Still the question must be regarded as an unsettled one, about which, it has been shown, there is great conflict of opinion among learned judges as well as ethical writers. Doubtless, a law in direct conflict with the dictates of natural justice, which

should take the land or vested estate of one and give it to another, either with or without compensation, where the government was in no way interested in the transfer, should be regarded as in conflict with the spirit of the federal constitution, which inhibits the state legislatures from passing any law impairing the obligation of contracts. As this prohibition extends to *executed* as well as *executory* contracts,(*a*) such an act seems to be embraced within its spirit. The question as to the right of courts to declare an act void, as against reason, is certainly attended with more difficulty, and doubtless they would hesitate much in regard to their right to declare an act void solely on this ground, where there was no conflict with any constitutional prohibition. When the legislature have deliberately passed an act and clothed it with all the solemnities and authority of a law, there might be great delicacy in any court assuming to array its own reason against that of the legislative body, acting as the legally constituted delegates of the supreme power of the state, in the exercise of their constitutional functions, and whose peculiar province it is to pass upon the reasonableness or unreasonableness as well as necessity of all laws.

§ 149. If this power and right of determination must of necessity be vested in some department of the government whose decision must be final and conclusive, where the validity of an act depends merely upon a question of reason, it may well be doubted whether this right of determination can be lodged with greater security to the citizen, in any other than the hands of their representatives, who are immediately accountable to their consti-

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(*a*) 3 Story on Const. § 1385, p. 256, 7. *Fletcher* v. *Peck*, 6 Cranch, 87, 135. 1 Kent's Com. 388. *New Jersey* v. *Wilson*, 7 Cranch, 164. *Terrett* v. *Taylor*, 9 Cranch, 535. 1 Kent's Com. 38.

tuents for all legislative acts, who are constantly subject to a severe rebuke, and liable to a speedy removal from the right to exercise this most sacred trust, should they be so regardless of moral principle, or of the consequences which must result to themselves, should they dare to abuse their trust by trampling under foot the sacred inherent rights of man. Higher considerations, and a more imperious duty, would press upon the minds of our judicial tribunals, should the legislative department so far forget its obligations as to violate its trust, by the passage of an act which would be subversive of the great fundamental principles of the social compact, at war with the spirit, object and design of that compact. If called upon to pass upon such an act, the natural delicacy of the judiciary would, doubtless, yield to the more imperious necessity of vindicating natural right, sustaining natural justice, protecting the social compact, so that there would be less reluctance or delicacy in the exercise of their judicial functions, in the discharge of their duty to society and their country, as well as in view of their accountability to a higher and more august tribunal, to declare such an act as not within the powers delegated to the legislature and therefore null and void. However this question may be regarded, it affords consolation to the American patriot to indulge in the reflection, that it is undoubtedly true under our form of government, owing to the immediate accountability of the representative to his constituents, the deep and pervading sense of duty as well as of justice, the prevalence of moral and religious principles in the community, there is less reason to apprehend an occasion which shall call for a judicial determination of this point in this country than there is under any other form of government. Our representatives being selected by all classes of society from among the people themselves, each entitled to a

voice in that selection, and every man rendered eligible to this exalted station of trust and power, a sacred regard for individual right of property, and the security of civil liberty, is the natural production of republican institutions. Property too, in this country, being more equally divided than in most any other, all classes in society being more or less in the enjoyment of it, and sharing equally in the fruits of our republican institutions, most of our citizens are doubtless deeply impressed with the importance and necessity of its protection. This high regard for the elementary principles of natural justice; for the fundamental principles of our state and national constitutions, has become so indelibly impressed upon the minds of the great masses in society, there is less danger of these principles being forgotten, disregarded, or trampled under foot by our representatives than under any other form of government.

The genius and spirit of our institutions, the nature and character of our civil and social relations, the fundamental principles of our social compact, are so accurately defined by means of our written constitutions as not readily to be misapprehended; hence there is less danger to be apprehended of a flagrant abuse of trust or a disregard of duty by the constituted representatives of a spirited, chivalrous, free, and enlightened constituency.

§ 149. Under this head it may be well to consider the power of the legislature, independent of any constitutional restrictions to pass *retrospective* laws which shall have a *retroactive* effect. At this point the question arises, what is a retrospective law in the sense which in this connection we use the term? Retrospective laws are not confined to such as are enacted to take effect at a time anterior to their passage; but this term embraces all statutes which, though operating only from their passage, affect VESTED RIGHTS and past transactions. It

would be a construction utterly subversive of all the objects of an implied inhibition upon legislative power in this respect, to confine it to statutes which were to take effect anterior to their passage. It would enable the legislature to accomplish that *indirectly*, which we are now contending it cannot do *directly*. Upon principle, every statute which, as to the *citizen*, takes away or impairs *vested rights* acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed *retrospective*.(*a*)

§ 150. Having defined the term "*retrospective law*," the question arises, can the legislature, in the exercise of its inherent power, lawfully enact such a law, or would such a law if enacted bind the citizen? In the consideration of this question we shall assume, that all the legislative power of the people of a state is vested in the legislature, as their legally constituted representatives. For the constitution of a state is not, as is the federal constitution, a mere *delegation of power* to the legislature, but a *restriction* upon the otherwise inherent power of this department of government. It is undoubtedly true, that a state legislature is vested with all the law making power of the state. But does the law making power give to the legislature the power to make a retrospective law, to have a retroactive effect; that is a law to regulate transactions past, or to fix and prescribe a rule of civil conduct for times and events past?

§ 151. The answer to this question involves the inquiry, what is legislative power? This may be defined, the power to enact *rules* which must be observed in the CIVIL CONDUCT of men; or in other words, the legislative power in this respect is synonymous with *law making authority*, or a power to *enact laws*. The legislature

(*a*) *The Society, &c.*, v. *Wheller*, 2 Gallis. 139.

then, under its general power of law making, can enact laws; and under this INHERENT POWER, it can do nothing more. What then is a law? It is a rule of *civil conduct*, and as such prescribed for, and attaching itself to, the future actions of men. It must from its very nature be prospective, otherwise it cannot be a rule of civil conduct. It cannot attach itself to conduct antecedent to the rule itself. It is impossible to form the idea of a rule of civil conduct applicable to acts done antecedent to the rule itself; for at the time the particular past transaction took place, a law subsequently passed was not, and could not from the very nature of the case, be then an existing rule governing such conduct. The conduct of the past must stand acquitted or condemned, be lawful or unlawful, when judged by those rules, and those only, which had an existence at the time the transaction took place. The future alone can be called upon to observe the dictates of every new rule. It has been very justly said—"To establish a rule by which a person should be required to shape his past conduct, would be to legislate an *absurdity;* to enact what would be an utter impossibility."

Chancellor Kent says: "The very essence of a new law is a rule for future cases." "*Nova constitutio futuris formam imponere debet et non præteritis*," is the language of Bracton.(*a*)

§ 152. The construction put upon legislative power at a very early period accords with this view. English courts as early as 1667, decided that a statute could not operate retrospectively. When, therefore, the term legislative power is used in a state constitution, this term must be deemed to be used in accordance with this common acceptation of the term, as defined by the common

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(*a*) Liber iv. p. 238.

law of England antecedent to the existence of any of our state constitutions. Unless such are the limits to legislative authority, no man can know what his rights are, or the law by which they are to be ascertained, or what property is his or another's. A law or rule of civil conduct looking before and after is certainly inconsistent with all ideas of a law in its settled, definite, technical sense.

§ 153. Retrospective laws are not only inconsistent with the idea of a law, as a rule of civil conduct, but they are in many instances only the exercise of powers which are in their nature strictly *judicial*, instead of *legislative*. Such laws, when only such, look not to the future, but upon the past; or, in other words, pronounce judgment upon acts done antecedent to their adoption; and, in this respect, they assume a *judicial* power, as contradistinguished from what is strictly *legislative* power. They assume to give character to facts which they did not possess at the time they took place, and then to judge of them in the new character thus legislatively created for them; to settle, in some instances, old rights depending on laws as they existed before the act was passed, by new principles created and applied by the retrospective act having no existence antecedent to the time of its passage, which then, and not till then, sprang into being.

§ 154. Such acts have frequently been considered as unconstitutional: that question, however, does not arise under our present inquiry. We shall consider it, as well as the question as to what acts are deemed retrospective, in a subsequent chapter. What we have said in this connection we think clearly indicates that legislative *omnipotence* with all of its creative energies, must be regarded as possessing no power under its inherent law making power to create or prescribe a rule of civil conduct, applicable to the past, affecting vested rights. Every attempt of that kind, from the very nature of the

case, must be regarded as ineffectual to attain such an end if designed; and whenever attempted to do so, it should be treated as an abortive act.

§ 155. In the remarks here made, we do not intend to be understood as maintaining the proposition, that the legislature cannot under any circumstances pass a mere remedial act, which in its effect by way of *definition*, may have a retroactive operation, by way of relation to past events. Such acts of legislation, when limited within their appropriate sphere, may undoubtedly be within legislative power, and such acts have often received a judicial sanction. But the legislature under a pretence of a remedial law, cannot engraft upon such law provisions invading the sanctuary of vested rights, or prescribe rules of action to be observed in reference to acts past, impairing such rights or condemning such conduct, so as to make acts previously done which were lawful in their inception, unlawful *ab initio*. The constitution it is true, has thrown around vested rights its broad shield, but under the view we have taken, such rights would be protected from acts of legislative aggression in the form of retrospective laws, were the constitution entirely silent upon this subject.

§ 156. An eminent jurist has justly said: "Acts of the legislature which look back upon interest already settled, or events which have already happened, are *retrospective*, and our constitution has in direct terms prohibited them, because '*highly injurious, oppressive, and unjust.*'(*a*) *But perhaps their invalidity results no more from this express prohibition, than from the circumstance that in their nature and effect, they are not within the legitimate exercise of legislative power.* For, though under the name of '*ex post facto*' laws, when 'made for the

(*a*) Bill of Rights of N. H. Ante § 82, p. 127.

punishment of offences' they have long been seriously reprobated because more common in times of commotion, and because they endanger the character and person, as well as property; yet laws for the decision of civil causes made after the facts upon which they operate *ex jure post facto*, are alike retrospective, and rest on reasons alike fallacious." He, however, wished it distinctly understood that acts of the legislature were not within the above prohibition, unless they operate upon the interest of individuals, or of private corporations. Nor were they within them when, in any implied or express manner, the parties affected had consented to their passage; as all public officers impliedly consent to alterations of the institutions in which they officiate, provided the public deem it expedient to introduce a change, so all citizens consent to the passage of acts which the constitution in express terms has enabled the legislature to make, though those acts might otherwise be unjustifiable, because all either aided to form, or by living under it, are presumed to adopt the constitution. Nor could acts of the legislature be opposed to these fundamental *axioms* of legislation before particularized, unless they impair rights which are vested, because most civil rights are derived from public laws; and if before the right became vested in particular individuals, the convenience of the state produces amendments or repeals those laws, those individuals have no cause of complaint. The power that authorizes or proposes to give, may always revoke before an interest is perfected in the donee.(*a*)

§ 157. Under a statute of Massachusetts, which took effect on the first day of June, 1818, and which provided in substance, that the inhabitants of a town who might have incurred expense for the support of any pauper, might recover the same against such person by an action

(*a*) Woodbury, J., *Merrill* v. *Sherburn*, 1 N. H. Rep. 213.

of assumpsit, this question arose incidentally in an action of assumpsit.(*a*) In that case a question was raised whether, under this act, a recovery could be had against a pauper for money advanced by a town in such expenses before the act took effect. Chief Justice Parker, in deciding that the act must be construed as prospective and not retroactive, said, "It is objected to the recovery that, as by law, no debt or promise was created by the performance of the charitable duty imposed on the inhabitants of towns and districts towards persons who might fall into distress within their limits, it was not within the constitutional power of the legislature to create a new obligation, founded upon supplies which had been enjoined by law before the passing of the statute. If it be true, that this statute, instead of providing a remedy for an existing contract, must be construed to create a debt or obligation, on a consideration which had past, and which was not of itself a legal foundation for a promise, it would seem very clear that the statute was enacted improvidently, and that it could not have the intended operation. It must be presumed to have been known to the legislature that an action could not be maintained by the inhabitants of a town, for a reimbursement of expenses incurred for the support of one, who was actually a pauper when the supplies were furnished, and therefore it was less probable that it was intended that this statute should have a retroactive effect. *For no legislator could have entertained the opinion that a citizen, free of debt by the laws of the land, could be made a debtor merely by a legislative act declaring him one.*

§ 158. Under the constitution of Massachusetts there is no inhibition upon legislative power in this respect, nor is there any in the federal constitution, as that is only directed at *ex post facto* and not at retrospective

(*a*) *The Inhabitants of Medford* v. *Learned*, 16 Mass. R. 215.

laws. Hence, the power of the legislature above considered by Chief Justice Parker, was its power in this respect irrespective of any constitutional restriction. It is true, he placed the decision of the cause upon another ground, and did not necessarily decide the precise point, in question. Yet the above remarks clearly indicate that on the point under consideration, his mind coincided with the views we are endeavoring to establish on this question. Mr. Justice Aikens, in the case of *Bates* v. *Kimball*,(a) after adverting to Blackstone's definition of law, that is, "*a rule of civil conduct prescribed*," &c., and "*that all laws should be made to commence in futuro*," says: The court would not be understood to say that no statute law can be valid which relates to a transaction antecedent to its enactment; as, for instance, a statute of pardon. *The principle meant to be laid down is, that an act not expressly permitted by the constitution, which impairs or takes away rights vested under pre-existing laws is unjust, unauthorized, and void.*

§ 159. We have been unable to find any case in our courts where this precise point has received an authoritative judicial sanction, as in all cases which have come under our observation where retrospective laws have been declared void, it has been for the reason that such laws were in conflict with some vested right, secured by some constitutional guarantee, the difficulty surrounding this question has, in most cases, induced our courts to elude the question by a decision, that particular acts were not to be construed as having a retroactive operation. We are aware that the view we have taken upon the question of legislative power to pass retrospective laws, having a retroactive effect, has been, in some instances, denied, in others, questioned. A contrary opinion has been attempted to be sustained and fortified by

(a) 2 Chip. R. 89.

arguments derived from the civil law, legislative precedents, and judicial decisions.

§ 160. The argument derived from the civil law is that inferred from the language of the code: "*Laws are made with reference to cases that shall happen for the future only, and must not comprehend actions that are passed before their establishment, unless it is enacted that they shall comprehend a past action.*" "*Leges et constitutiones futuris certum est dare formam negotiis, non ad facta præterita revocari; nisi nominatim et de præterito tempore et adhuc pendentibus negotiis cautum sit.*"(*a*) Domat states the rule, with this exception, "unless for particular reasons the new laws indicate expressly that their provisions are to apply to the past, or unless without such indication they must serve as a rule for past things," &c. It has been supposed that the above cited provision in the code inferentially sanctioned the making of retrospective laws. That the civil law is the basis of the different codes on the continent of Europe, and that the same general rule was incorporated into the English law. To this we answer, that, under this clause of the code, the question determined by it is not one of *power*, but one of *construction* merely. But if it were, it by no means follows that such a power under the despotic government of the Roman emperors, if exercised by them, affords even a persuasive argument, much less a conclusive one, in favor of the proposition that it remains inherent in the legislature under our more enlightened system of government, the spirit, genius, and whole theory of which is at war with every principle of despotism or legislative aggression or tyranny. May it not be reasonably inferred, that during the more than thirteen centuries which have elapsed since the code came forth(*b*) that some progress

(*a*) Wood's Civil L. 95. Chap. i. 24, 7.

(*b*) The code of Justinian was published A. D. 534, and the Digest and Pandects A. D. 533.

has been made in the science of legislation, and especially that some of the powers exercised under that ancient system of government may be regarded as having long since ceased to exist, or that they never received the sanction of the people of our government, without which they never could have crept into our political system, which is practically and emphatically founded on the assent of the people themselves. Certainly they cannot be presumed to lurk under any general grant of legislative power, nor can they be said to result from any implication.

§ 161. We apprehend, however, that the doctrine that retrospective laws having a retroactive effect may be passed by the law makers, has but little countenance in the doctrines of the civil law, excepting so far as they are purely remedial in their character. A civil law writer lays down these rules on this subject: "Law is a direction of manners, prescribing what is to be avoided; but they are things *in futuro* only that can possibly come under that description, *i. e.* can be avoided or not. It is a lesson or rule of conduct, wherein each man is told what is expected of him for the future; but it is altogether unconcerned as to the part in which that man has acted before. And how could it be otherwise? For as positive law is only a declaration of will, and is generally concerned in prohibiting something which before was not prohibited, how great would be the absurdity to punish a transgression before it was declared to be so, and restrain an evil which, *ex hypothesi*, is no evil at all.

"*Quid enim antiquitas peccavit quæ præsentis legis inscia pristinam secuta est juris observantiam.*(a) *In lege voconia non est, fecit, fecerit; neque in ulla præteritum tempus reprehenditur. De jure civili siquis novi quid instituis, is omnia, que ante acta sunt, rata esse non patitur?*

(a) C. vi. 23, 29.

Cedo mihi Leges Atinias, Furios, ipsam ut dixi, voconiam, omnes præterea de jure civili; hoc reperies in omnibus statui jus, quo post eam legem populus utatur.(*a*) But then this regards only the *actions* of such as are subject to law, not the *disposition* of such as have the *power* of forming it. And therein consists the distinction of the two principles which I have laid down. For no previous instituted law of man can prejudice or invalidate any future constitution; so no future constitution can operate to the prejudice of any past action. It is an equal absurdity, that law in the one case should *valere ad ventura*, or in the other *ad præterita.*(*b*) The writer then delineates the line which limits the bounds of legislative authority in this respect. He says: "What I have said of the prevalence of law *in futurum* only, will have its use in the following considerations. I have said that no law giver was tied down to his own resolutions, but either he himself or those that come after him, upon proper emergencies and upon proper suggestions, might alter them for the public advantage. It must, however, be understood with this restriction, "*that he cannot alter his mind to another man's disadvantage*,"(*c*) or amend a law which to another has "*created a right*." And even this restriction wants to be restrained itself; for, "as to that man he is bound, as to others not." The whole of this is best seen by instances. As it is a matter of indifference whether the state permits a man to dispose of his effects, or directs them in a channel of nature to the heirs at law. I can suppose one of the directions altered on a sudden, and wills, for instance, to be declared of no force hereafter. Here many things will meet my readers' observation, which I have been discussing upon, to wit:

1st. As either way of succession *vel ex testamento, vel*

(*a*) Cic. III. Verrin, 42.
(*b*) Taylor's Civil Law, 168.
(*c*) D. 50, 17, 75.

ab intestatio, is indifferent, the law may direct either course indifferently, and change its mind uncontrolably.

2nd. Those who were in possession of property before, under the operations of a will, were in possession of a right, which no power can defeat by the alteration of judgment.

3d. For if an alteration of judgment in the legislator could defeat a right created before, then a law can *valere in prateritum*, which we have seen to be absurd.

4th. However, a right thus created to *Tituis* (for instance) hinders not the law giver from prescribing other regulations to *Sempronius*. He is not tied down fatally to his own conclusions, nor those of others.

5th. But as there cannot be two laws for two several people, since law, as we have seen, must speak a *general* language, the effects only of the former law live in *Tituis;* but *Tituis*, as well as *Sempronius*, is concluded by the new law for future events, which was all this new law could engage for, in the person of *Sempronius*, as well as in the person of *Tituis*." Hence it will be perceived that this civil law writer actually fixes the limitations upon legislative power in strict accordance with the rule for which we have been contending and does not by any means give countenance to a contrary doctrine.

§ 162. The argument derived from legislative precedent, unless that precedent has been of such uniform and frequent occurrence as to raise the presumption that it has received the tacit assent of the people, upon a question of legislative power, is not by any means decisive of this question, nor do we regard it, standing alone, as entitled to much weight in the decision of this point. The degree of weight to which it is justly entitled will be considered in another place.

§ 163. It has also been insisted that this exception in reference to retrospective laws has been, and is, recog-

nized in England. In support of this position, it has been urged that in England it was for a long time a settled rule of construction, that an act of parliament which was to take effect from and after its passage, should operate from the first day of the session, let the act be passed on what day it might during the session; and that it had been held that this rule had been so long settled it could not be shaken, and that even the life of a person had been affected by the operation of it. That if one of our state legislatures by accident or any other cause, pass an act without date, the court must be governed by the same rigorous rule. In answer to this we have only to say, this rule originally was founded in a theory *false in fact*, to wit: that laws being enacted by the representatives of the people, every man in the eye of the law was supposed to be present in the legislature. An eminent divine, speaking of this presumption has facetiously remarked, "It would be an improvement on this delegated knowledge of the law, if the penalty was also delegated and the criminal punished by representation."(*a*) This doctrine, that nought but parliament could change the rule in England, rests on the basis that the British parliament is omnipotent in the scale of political existence; a doctrine which we have in this chapter endeavoured to show ought not, and does not, obtain under our government. That basis being removed, the rule itself must necessarily cease to exist. Even in England it has on account of its hardship and injustice, been changed by the statute of 33 Geo. 3, c. 13; and it ever has been the policy of our legislature to prevent such absurdity and injustice; and it has by express enactment uniformly provided, that statutes should not take effect until a certain number of days after their passage, except in instances in which no serious

(*a*) Robert Hall.

consequence could result to the citizen by the act taking effect immediately.

§ 164. It has been supposed that because the federal constitution, as well as some of the state constitutions, had prohibited "*ex post facto*" laws, that as every *ex post facto* law was *retrospective*, but all *retrospective* laws are not *ex post facto* according to the technical definition of the latter term, the including the one, and excluding the other; precluded the idea that *retrospective* laws, as contradistinguished from *ex post facto* laws, were intended to be prohibited; that this amounted to a tacit recognition of the validity of *retrospective* laws. This position assumes what we are not prepared to admit, that but for a constitutional restriction *ex post facto* laws might *lawfully* be passed. We cannot admit that the restriction necessarily implies the existence of the right; but we regarded it simply as a provision inserted for superabundant caution, under a supposition or apprehension that the legislature might, in times of great political excitement, be guilty of acts of *usurpation* and *tyranny*, not legitimate legislation, in passing *ex post facto* laws. Repeated instances of such *usurpation* have found place, and stood as foul blots upon the legislative history of nations. If the restriction upon acts of *usurpation* does not imply the existence of the right, then the argument is fallacious and unsound. We apprehend that an inhibition of *murder* under the statutes of a state, and the omission of any provision against *robbery*, would not necessarily imply a right in the citizen to rob his fellow men. True, that is an instance of an act "*malum in se*;" but is *usurpation* and *tyranny* any the less criminal in itself, especially if enacted against the life and liberty of the citizen?

§ 165. In support of such acts of legislation, much stress has often been placed upon the dictum of Judge Chase, that "Every law that takes away rights vested

agreeable to existing laws is *retrospective*, and is generally unjust and may be oppressive, and it is a general rule that they should have no retrospect. But there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to times antecedent to their commencement, as statutes of *oblivion* or *pardon*. They are certainly *retrospective*, and literally both concerning and after the facts committed. Every law that is to have an operation before the making thereof, as to commence at an antecedent time, or to save from statutes of limitation, or to excuse acts which are unlawful and before committed, and the like, is *retrospective*. But such laws may be proper or necessary, as the case may be."

§ 166. None of the instances cited by Judge Chase, with a single exception, come within our definition of the term *retrospective* laws, in the sense in which we use the term; and in the excepted instance, to wit: "*Laws to commence at an antecedent time*," the nature of the law thus referred to, is not stated. Acts of "*oblivion*" and "*pardon*," are not rules prescribing or ordaining what conduct shall be observed by the *citizen* as a rule to him; they only operate upon the government itself, and even as to it, as a rule of conduct, they are in effect *prospective*. The same may be said of acts, excusing acts which have been before unlawfully committed. The commandment given in such instances does not direct how the individual citizen who may have sinned shall in future conduct himself, or regulate his conduct, but how the government in its future action, shall regard and treat the sinner. Thus such acts, so far as the same are mandatory or directory, are purely prospective. It is true such statutes, as a future rule to be observed by the government in defining to what particular acts its action shall in that respect be confined, do by way of *definition* refer to past events, but it is only by way of

definition such reference is had. Statutes of limitation, as rules of conduct, may be placed on the same ground. They are directory to the judiciary, one department of the government, as to the rule it should observe in all future cases coming before it; hence, to it as a rule, they are in EFFECT *prospective*. The legislature enact that no action shall be maintained, unless commenced within a given time. That is purely a commandment to the judiciary, not to give a remedy. So long as that commandment stands, it is true, as to it, it is a rule; but it is one which is wholly *prospective*. It is only to be a rule for the judiciary, until that department of government whose right it is in this respect to ordain, shall see fit to revoke it, and when revoked it ceases to be a rule, even to that department upon which it was enjoined, and is only prospective in either event. Its operation as to those to whom the commandment as such is given, is not even RETROACTIVE. Such acts are not construed as extending to actions previously instituted. Although in the observance of this command as an effect proceeding from this cause, the citizens of the government may incur the loss of a particular remedy, which in its inception *originated* in a mere PERMISSION of government.

§ 167. The difficulty which has arisen in the minds of many on this subject, and which has induced them to imbibe the idea, that statutes of limitation were retrospective laws, has originated in a misconception of the true nature and extent of the commandment in such acts contained, and to whom as a rule of conduct such acts are directed. Instead of viewing them as to the citizen merely as permissive, provided their conditions were on his part complied with, they have regarded them as mandatory to him, whereas in truth and in fact, they are merely mandatory as an imperative rule to the government, and to it, as such, *prospective* merely. It is in this way, and from this misconception, many have reared a

superstructure upon a false and baseless foundation, for the purpose of demolishing our position by arguments which are necessarily fallacious, and which lose their force the instant the foundations upon which they rest are consumed by the torch light of truth.

§ 168. Such statutes, it may also be claimed, do not *create* the remedy, but are simply restrictions upon that which before existed by mere *tacit* acquiescence on the part of the government, not resting on the foundation of any positive enactment; hence whenever the government deems it expedient to refuse further to yield its assent to such a remedy in future actions, such refusal does not in any respect interfere with any vested right; for a right to a REMEDY, when not expressly *created* by positive enactment, partakes rather of the nature of a right at will, subject to be terminated at any moment when the government shall see fit to change its mind in this respect; and which, when changed, only affects by way of definition, contracts antecedently made, when the same shall thereafter come up for adjudication by that department of the government to which such acts, in all future cases, are a law or commandment. They do not even then touch any essential element in the constitution of the contract itself, but leave all its vital principles unimpaired. To such a change of mind on the part of the government, before any absolute right becomes vested in the citizen, he may be deemed as having yielded an implied assent. There seems no principle essential for protection, that demands any inhibition of such acts. The people when they founded the government, only needed to secure rights of property and of person; that being done, they, in making provisions for a redress of grievances, saw fit to and have founded a compact or body politic, as the common arbiter between them, to whose decision as to the mode of redress, they must be deemed to have tacitly yielded their assent, subject to

this qualification only—that under a pretext of a remedy, the government should not give a death-going stroke to contracts between the parties, or vested rights of property, or to personal rights.

§ 169. If the view which we have presented is a correct one, then it seems to us, that instead of such statutes being, as they have by some been understood to be, infringements upon or exceptions to the rule, that the legislature should not pass retrospective laws, they are in no sense as a rule prospective; and are not either an encroachment upon the rule, nor are they in fact exceptions to it; but on the contrary, when properly understood, are in perfect harmony with the position, that laws ought not to be either retrospective in their enactment, nor retroactive in their effect. Hence, the fact that such laws have received judicial sanction, is not conclusive as an argument in favor of the position that the enactment of laws clearly retroactive is within the legitimate powers of the legislature.

§ 170. Is it asked what we have gained by establishing the point, that statutes of limitation are not exceptions to the rule, that retrospective laws cannot be passed by the legislature, as they are not, in any proper sense, to be regarded as prospective. We answer, that in almost every instance in which the right to pass such laws has been attempted to be vindicated, and this power in the legislature sustained, such statutes constitute the great chain of precedent, by which it is attempted to bind down the intellects of men to a forced concession of such power; nay more, they, and other statutes of the same nature and standing upon the same basis, constitute the only links in the chain of evidence, or arguments deduced on this subject. If we have successfully destroyed that chain of precedent—if we have shown that such statutes are not precedents in support of this right, or instances of the exercise of such power by the legislature,

then we have effectually annihilated the strongest fortress which the human intellect, and the most subtle sophistry, has as yet been able to rear in defence of the absurd position, that the legislature have a legitimate right to pass laws *retrospective* in their nature, and retroactive in their effects.

§ 171. A learned and eminent counsellor, as well as highly respected author, has, in our opinion, fallen into an error as to the real nature and effect of such acts of legislation, and thus been led to entertain an opinion opposite to the one we have expressed. He has endeavored to support it on the authority of such acts having been held valid acts of legislation. In view of various cases of this character, in which such acts have been sanctioned, he remarks: "From the preceding review of the opinion of eminent jurists, and of adjudged cases, it manifestly appears that there are by the law of all states many cases in which the sovereign power may enact laws which, theoretically speaking, are retrospective. And whence, it may be asked, does this arise? From the necessary imperfections in human society. If society were so perfect, as never to be in need of occasional remedial and equitable regulations, by means of retrospective laws, it would perhaps hardly need any laws. But, we shall be asked, perhaps, if there is no limitation to this power of enacting retrospective laws? Unquestionably there is, in all communities, by that tacit consent, which has been before mentioned; and to what particular such consent is given must be learned from the habits and principles of the particular people who compose any such community. When, therefore, it is once admitted, that there are certain limitations of the absolute rights of men, it becomes a mere question of expediency with the sovereign power of the state, to what extent such limitation shall be carried, subject only to this restriction, that the retrospective provisions of

a law shall be reasonable, as it respects the whole community.

§ 172. This argument assumes that such laws are an infringement upon the rule that laws should not be retrospective. It seeks to make them exceptions, recognized by the people, and resting solely on the basis of such *tacit acquiescence* in them. Our previous position is a sufficient refutation of this specious argument. He adds, however, in connection with the above remarks, a proposition perfectly coincident with our views upon this question. He says: "One settled distinction, however, in regard to retrospective laws, appears to have been universally recognized by courts of justice, that the legislature may enact retrospective laws affecting the *remedy*, but not the *rights* of parties, as they are usually called. It may indeed be difficult, in many cases, to determine whether a law affects the one or the other, because every remedy is, in a certain sense, a right. But when the court shall have once arrived at the conclusion that a law does, unequivocally, belong to the one or the other, of these descriptions, they feel no hesitation in the opinion that they ought to pronounce." In *Dash* v. *VanKleek*,(*a*) it is laid down as a principle of universal jurisprudence, that law, civil and criminal, must be prospective and cannot have a retroactive effect, and an act of the legislature was not to be construed to operate retrospectively, so as to take away a vested right.

§ 173. The exception to the rule that laws should not have a retrospect, is thus laid down by the civil law writer we have above referred to: "However, it is not to be doubted, but that laws may, in some sense, and in some particular considerations, have a retrospect. If a law be introduced to explain or interpret an old one, *etiam secundam posuimus legem, eadem valere sancientes*—

(*a*) 7 J. R. 477.

et in hanc quoque secundam nostram constitutionem similiter adjecimus, oportere ejus legislationem, et ad seniora referri tempora, exceptis illis causis, quas aut judicialis, sententia, aut transactio terminavit.(*a*) If it be enacted *de rebus adhuc pendentibus*—if it be declarative of common law—if it should be introductive of an exception or a release, as, for example, if the legal interest of money should be lowered by a new law, it is plain, that a former act (namely, the obligation of rendering a larger interest,) is dissolved by this law and a new one contracted.(*b*)

§ 174. We have only to say in conclusion, that our remarks on this somewhat intricate question are submitted with much distrust and diffidence, as the results of our own reflections. We have not given them to the profession with an expectation that they will receive the concurrence of other minds; nor do we desire to have it understood, that they are in any respect authoritative; being assured that they will be coincided in only so far as they are fortified by the reasoning and arguments we have been able to adduce, upon a question of conceded intrinsic difficulty and doubt.

(*a*) Nov. 19, pr. (*b*) Taylor's Civil Law, 169.

CHAPTER VIII.

OF CONSTITUTIONAL RESTRICTION UPON LEGISLATIVE POWER.

§ 175. In a preceding chapter we considered the nature and extent of legislative power, independent of any restriction contained in the written fundamental law of a state. First, under the form of government in England, where the fundamental law has never been reduced to the form of a written constitution; and secondly, under the forms of government of the states of this Union.

§ 176. The subject next in order demanding consideration is, what is the nature and the extent of restraints upon the exercise of legislative power under our own written constitutions? They are of a two-fold character: first, those imposed by the constitution of the United States government; and secondly, those imposed upon the legislature of each state under the respective state constitutions. In regard to the restrictions upon the legislative powers contained in the federal constitution, it should be observed, that those restrictions have a two-fold application, some being directed solely to the powers of the congress of the United States, while others are intended to act upon the legislative power of the respective states.

§ 177. I shall, in the first place, advert to those which apply only to the congress of the United States. It may be laid down as a general rule, that the limitations on power contained in the United States constitution, when expressed in general terms; they are naturally and necessarily applicable to the government created by that instrument, and have no application to the legislative

power of the state governments. This rule was settled by the Supreme Court of the United States in the case of *Barron* v. *The Mayor and City Council of Baltimore.*(*a*) In this case it was held, that the provisions in the 5th amendment of the constitution of the United States, which declared that "private property shall not be taken for public use without just compensation," was intended solely as a limitation on the exercise of power by the government of the United States, and was not applicable to the legislatures of the states.(*b*) The reason for this opinion was, that the constitution was ordained and established by the people of the United States of America for themselves, for their own government, and not for the government of the individual states. That each state established a constitution for itself, and in that constitution provided such limitations and restrictions on the power of its particular government as its judgment dictated. That the people of the United States framed such a government for the United States, as they supposed best adapted to their situation, and best calculated to promote their interests. The powers conferred on their government were to be exercised by itself, and the limitations on power, if expressed in general terms, were naturally and necessarily applicable to that government created by that instrument. They are limitations upon the powers granted in the instrument itself, and not of distinct governments framed by different persons, under different instruments, and for different purposes.

§ 178. In accordance with this principle, it has also been held, that the seventh amendment of the constitution of the United States, which declares that, "in actions at common law, where the value in controversy shall exceed twenty dollars the right of trial by jury shall be

(*a*) 7 Peters' Rep. 243.

(*b*) See also *Livingston* v. *Mayor of New York*, 8 Wen. 85.

preserved," does not apply to the state governments, but restricts only the government and officers of the United States, and proceedings in the federal courts.(*a*) So too the same construction has been given to the sixth amendment of the federal constitution, which secures to the accused a trial by a jury in all criminal prosecutions.(*b*) It has also, upon the same principle, been held, that the provision in the constitution of the United States, "That cruel and inhuman punishment shall not be inflicted," does not extend to the state governments, but was intended only for the legislature and judiciary of the United States.(*c*) The same has also been held in relation to the fourth amendment of that constitution, securing persons, houses, &c., against unreasonable searches and seizures, and requiring a particular description in warrant of the place to be searched or things to be seized.(*d*)

§ 179. It is proper before proceeding to the consideration of the limitations upon the powers of the national legislature, that we should also allude to a palpable distinction between the powers of congress, and those possessed by the legislatures of the respective states. On the one hand, the legislature of the respective states, independent of any constitutional restriction, are undoubtedly vested with all the legislative powers possessed by the people themselves in their individual capacity, and may exercise the same in any manner consistent with the great principles of *natural justice*, and as amply as the same could be exercised by those from whom this

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(*a*) *Livingston* v. *The Mayor, &c., of New York*, 8 Wend. 100. *Colt* v. *Eves*, 12 Conn. R. 243.

(*b*) *Murphy* v. *The People*, 2 Cowen, 815. *Jackson* v. *Wood*, 2 Cowen, 819.

(*c*) *James* v. *The Commonwealth*, 12 Serg. & Rawle, 220. *Barker* v. *The People*, 3 Cow. R. 687.

(*d*) *Reed* v. *Rice*, 2 J. J. Marsh. 45.

power is derived, were they living under a purely democratic government. Unless there is some constitutional restriction.

§ 180. It should be observed, a constitution of a state is a form of government instituted by the people in their sovereign capacity, in which just principles and fundamental law is established. It is the supreme will of the people, permanent, and fixed, in their original, unlimited, and sovereign capacity; and in it are determined the conditions, rights, and duties of every individual of the community. From the decrees of the constitution there is no appeal, for it emanates from the highest source of power, the sovereign people. Whatever condition is assigned to any portion of the people, by the constitution, must necessarily be inevitably fixed, however unjust in principle it may be, until revoked by the same sovereign power. A legislative act is the will of the legislature; and it has been said, that the constitution is their commission, and they must act within the pale of their authority. But, however, it must be remembered, that although the constitution of a state is a limitation upon the powers of the legislative department, still that department, unless restricted by the constitution, possesses every power not delegated to some other department of government, although, as to other departments, it is in the nature of a general grant of powers.(*a*)

§ 181. On the other hand, as the government of the United States is a derivative one, it can claim no powers which are not granted to it by the constitution, either in express terms or by necessary implication. All powers not delegated to it, or not inhibited to the states, are reserved to them or the people. The powers bestowed by the constitution upon the government of the United States, are limited in their extent, and are not in-

(*a*) *Field* v. *The People*, 2 Scamm. 81.

tended to be, nor are they to be construed with other powers before vested in the state governments.(*a*) As the state governments retained the right to make all such laws as they might think proper within the ordinary functions of the legislature, if not inconsistent with the powers vested exclusively in the federal government, they only look to that instrument for *restrictions upon*, and not for *grants* of legislative authority, whilst the national legislature are dependent entirely upon the provisions of the federal constitution for all the powers which it possesses, and, like the government under which it exists, it can exercise no powers except those expressly granted or arising by necessary implication.

§ 182. In order to arrive at an accurate and comprehensive view of the powers of, and restrictions upon congress, it will be necessary in the first place to advert to the terms of the grant itself, and to the judicial construction which it has received since its adoption. In doing so, we shall take up each clause of the grant, and then in connection with it allude to the construction it has received, without any attempt on our part either to discuss the question of the accuracy or inaccuracy of such construction, or to review the conflict of opinion between the judiciary and those master spirits of the age of its adoption, who have reflected so much light upon this intricate and most important question of interest to the American nation. We shall confine ourselves to the text of the constitution and to judicial construction, and studiously avoid adopting the opinion either of political writers or commentators upon this branch of American jurisprudence.

§ 183. The express, delegated powers of Congress are defined in the 8th section of Article I. of the Constitution

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(*a*) 3 Wash. C. C. 313.

of the United States, which declares that Congress shall have power—1st. To lay and collect duties, taxes, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises, shall be uniform throughout the United States.

§ 184. In *Hylton* v. *The United States*,(*a*) the question involved in the case was, whether the law of congress of 5th June, 1794, entitled "An act to lay duties upon carriages for the conveyance of persons," was unconstitutional and void. It was claimed that it was; for that the tax was direct, and should have been laid according to the census; that it was not laid by that rule of apportionment, but by the rule of uniformity prescribed in the case of duties, imposts, &c. By the second section of the first article of the constitution, direct taxes were to be apportioned among the several states according to their numbers. By section 9, no capitation or other direct tax, was to be laid unless in proportion to the census. It was held, that the great object of the constitution was to give congress a power to lay taxes adequate to the exigences of the government, but they were to observe two rules in imposing them, to wit: *uniformity* when they laid duties, imposts and excises, and apportionment according to the census when they laid a direct tax. Other species of taxes, not direct, and not included in the words duties, imposts and excises, might be laid by the rule of uniformity or not, as congress thought proper. That if only these four species of taxes were meant, the general power to lay taxes was unnecessary. If it had been intended that congress only should lay those four taxes, &c., the language would have been, "Congress shall have power to lay and collect direct taxes and

(*a*) 3 Dallas, 171.

duties, imposts and excises. The first shall be laid according to the census, and the last three shall be uniform throughout the United States." The power in this 8th section to lay and collect taxes, includes a power to lay direct taxes whether capitation or any other. And also duties, imposts and excises, and every other species and kind of tax whatever, and called by any other name. Duties, imposts and excises, were enumerated after the general and comprehensive term, taxes, only for the purpose of declaring that they were to be laid by the rules of uniformity. A general power was given to collect taxes of every kind or nature without any restraint, except only on exports; and two rules are prescribed for their government, uniformity and apportionment. Three kinds of taxes, to wit: duties, imposts and excises, by the first rule, and capitation or other direct taxes by the second rule. That some taxes might be direct and indirect at the same time, but no taxes were contemplated as direct taxes, but only such as congress should lay in proportion to the census. The rule of apportionment was only to be adopted in such cases where it could reasonably apply, and the subject taxed must determine the application of the rule. It was conceded that if this was a direct tax it would be unconstitutional, because it had been laid pursuant to the rule of uniformity, and not to the rule of apportionment. On the one hand it was contended, that as a tax on carriages did not come within the words duties, imposts or excises, it was a direct tax; and on the other hand, that as this tax is not a direct tax, it must be a duty or excise. Patterson, Justice, held the term taxes was generical, and was made use of to vest in congress plenary authority in all cases of taxation. The general division of taxes was into direct and indirect; indirect stands opposed to direct. There might be an indirect tax on a particular article, that could not be comprehended within the description

of duties, imposts and excises. In such cases it was comprehended under the general denomination of taxes. The term tax was a *genus*, and included, 1. Direct taxes. 2. Duties, imposts, and excises. 3. All other classes of an indirect tax, and not within any of the classifications enumerated above.

§ 185. Iredell, J., held, that congress possessed the power of taxing all taxable objects without limitation, with the particular exception of a duty on exports. There were only two restrictions on the exercise of this authority:

1. All direct taxes must be apportioned.

2. All duties, imposts or excises, must be uniform.

That this tax could not be considered within the meaning of the constitution, a direct tax, nor was it comprehended within the terms duties, imposts or excises; hence, there was no provision in the constitution one way or the other, so that it was left to such an operation of the powers as if the authority to lay taxes had been general in all instances, without saying any thing about uniformity or apportionment. As all direct taxes must be apportioned, the constitution contemplated none as direct but such as could be apportioned. That this could not be apportioned, and therefore was not a direct tax.

§ 186. It may not be amiss in this connection to remark, that it has been questioned whether in cases where this power of taxation vested in congress, it was not to be exercised alone by it exclusive of the state sovereignties. The principle now seems well settled that in consequence of the supremacy of the laws of congress, and the necessary consequence of that supremacy, its instruments employed in the execution of its powers, are exempt from taxation by the state governments. These decisions rest upon the principle, that although the sovereignty of the state extends to

every thing which exists by its own authority, or is introduced by its permision; it does not extend to those means which are employed by congress to carry into execution powers conferred upon that body by the people of the United States.(*a*)

§ 187. In the case of *Loughborough* v. *Blake*,(*b*) it became a question whether, under this section of the constitution, congress had the power to levy a direct tax on the District of Columbia. It was held that it had; that the grant was general, without limitation as to place; that it consequently extended to all places over which the government extends. If there could have been a doubt of this, it would be removed by the subsequent words which modified the grant. These were—"*But all duties, imposts and excises, shall be uniform throughout the United States.*" It could not be contended, that the modification of the power conferred extends to places to which the power itself did not extend. That this power thus modified, must be exercised throughout the United States. The District of Columbia, or the territory west of the Missouri, was not less within the United States than New York or Pennsylvania, and it was not less necessary on the principle of the constitution, that this uniformity should be observed in the one, than in the other. Since the power to lay and collect taxes, which includes direct taxes, is co-extensive with the power to lay and collect duties, &c., and since this extends throughout the whole United States, the power to impose direct taxes also extends throughout the whole United States.

§ 188. The second grant of power to congress is—TO BORROW MONEY ON THE CREDIT OF THE UNITED STATES.

(*a*) 4 Pet. R. 564; 4 Wheat. 316; 4 Cond. 468; 9 Wheat. 738; 5 Cond. 742.

(*b*) 5 Wheat. 317; 4 Cond. 660.

It has been held, that this power to borrow money thus conferred on the congress of the United States, amounts to an inhibition against the state legislatures passing any act which may in its effect operate as a restraint or control over the exercise of this power, and hence that no tax can be imposed by authority of state laws upon stock issued by the United States for loans made to it. It has been asked if the states and corporations throughout the Union possess the power to tax a contract for the loan of money, what shall arrest the principle in its application to every other contract? What measure can government adopt which will not be exposed to its influences? No power has been conferred by the American people on their government, the free and unrestrained exercise of which more deeply affects every member of the republic. It was when the honor, the safety, the independence of the nation were to be defended, when all its resources were to be strained to the utmost, credit must be brought in aid of taxation. And the abundant revenue of peace and property must be anticipated to supply the exigences, the urgent demand of the moment. The people, for objects the most important which can occur in the progress of nations, have empowered their government to make the anticipation "to borrow money on the credit of the United States." Could any thing be more dangerous or more ignominious, than the admission of a principle which authorizes every state and every corporation in the Union, which possesses the right of taxation, to burthen the exercise of the power at their discretion? If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent within the jurisdiction of the state or corporation which imposes it, which the will of each state and corporation may prescribe. A power which is given by the whole American people for their common

good, which is to be exercised at the most critical periods for the most important purposes, on the free exercise of which the *interests* certainly, perhaps the *liberty* of the whole, may depend, may be burthened, impeded, if not arrested, by any of the organized parts of the confederacy. That the power of taxation was one of the most essential to a state, and one of the most extensive in its operation. The attempt to maintain a rule which should limit its exercise, was undoubtedly among the most delicate and difficult duties which could devolve on those whose province it is to expound the supreme law of the land in its application to the cases of individuals. In the performance of it, courts have considered it as a necessary consequence from the supremacy of the government of the whole, that the general government in its action in the exercise of its legitimate powers, should be free and unembarrassed by any conflicting powers in the possession of its parts; that the powers of a state could not rightfully be so exercised as to impede and obstruct the free course of those measures which the government of the states united may rightfully adopt.

§ 189. It was admitted that the power of a government to borrow money cannot be directly opposed, and that any law directly obstructing its operation would be void; but a distinction was taken between direct opposition, and those measures which might consequently affect it; that is, that a law prohibiting loans to the United States would be void, but a tax on them to any amount was allowable. This distinction was not upheld by the court. It held it was not the want of original power in an independent sovereign state, to prohibit loans to a foreign government, which restrains the legislature from direct opposition to those made by the United States. The restraint was imposed by our constitution. The American people had conferred the power of borrowing money on their government, and by making that

government supreme, had shielded its action in the exercise of this power, from the action of the local governments. The grant of the power was incompatible with a restraining or controlling power, and the declaration of supremacy is a declaration that no such restraining or controlling power should be exercised. The right to tax the contract to any extent when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burthen on the operations of government. It may be carried to an extent which shall arrest them entirely.(*a*) The case last cited reversed the same case decided in the court of South Carolina.(*b*)

§ 190. It has also been held, that the states have no right to tax any of the constitutional means employed by the government of the United States to execute its constitutional powers. That the states had no power by taxation or otherwise, to retard, impede, burthen, or in any manner control the operation of the constitutional laws enacted by congress to carry into effect the powers vested in the national government. That a law imposing a tax upon all banks or branches thereof in the state of Maryland not chartered by the legislature, was unconstitutional so far as it taxed the capital of the bank of the United States situate in that state. Although it was admitted that this principle did not extend to a tax paid by the real property of the bank of the United States, in common with other real property in a particular state; nor to a tax imposed on the proprietory inte-

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(*a*) *Weston et al.* v. *The City Council of Charleston*, 2 Pet. R. 465.

(*b*) Harper, 340. See also, *The Commonwealth* v. *Morrison*, 2 Marsh. 75.

rest which the citizens of that state might hold in the institution, in common with other property of the same description throughout the state.(*a*)

§ 191. It was admitted in that case, that the power of taxation was one of vital importance; that it was retained by the states; that it was not abridged by a grant of a similar power to the government of the Union, and that it was to be concurrently exercised by the two governments; but that such was the paramount character of the constitution, that it had capacity to withdraw any subject even from the action of this power. That the states were expressly forbidden to lay any duties on imports or exports, except what might be absolutely necessary for executing their inspection laws.

§ 192. If the obligation of this prohibition must be conceded—if it might restrain a state from the exercise of its taxing power on imports and exports, the same paramount character would seem to restrain, and certainly might restrain, a state from such other exercise of this power as was in its nature incompatible with and repugnant to the constitutional laws of the Union. It was admitted that there was no express provision for this case; but that the claim was sustained on a principle which so entirely pervaded the constitution, was so intermixed with the materials which composed it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it into shreds. This great principle was, that the constitution and the laws made under it, were supreme, that they controlled the constitutions of the respective states. That a power to create implied a power to preserve; that a power to destroy, if wielded by different hands, was hostile to, and incompatible with these powers to

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(*a*) *McCulloch* v. *State of Maryland*, 4 Wheat. 316.

create and preserve. That where this repugnancy exists that authority which was supreme must control, and not yield to that over which it was supreme. That a power to create a bank had been established in this case; that the power of taxing it by the state might be exercised so as to destroy it, was too obvious to be denied. It was admitted that the power of taxing the people and their property was essential to the very existence of government, and might be legitimately exercised on the objects to which it was applicable, to the utmost extent to which the government might choose to carry it. That the only security against the abuse of this power was found in the structure of the government itself. In imposing a law, the legislature acts upon its constituents. That this was, as a general thing, a sufficient security against onerous and oppressive taxation. That the people of the state therefore give the government a right to tax them and their property, as the exigences of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislature, and on the influence of the constituents over the representatives to guard against its abuse. But the means employed by the government of the Union had no such security. That the power to tax involved the power to destroy; the power to destroy might render useless the power to create. There was a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other with respect to these very measures was declared to be supreme over that which exerted a control. If the states might tax one instrument employed by the government in the execution of its powers, they might tax any and every other instrument; the mail, the mint, patent rights, papers of the custom house, laws, and judicial powers, and all the means employed by the government, to an excess which would de-

feat the ends of government. It however was determined, that this principle did not extend to a tax paid by the real property of the bank of the United States, in common with the other real property in a particular state, nor to a tax imposed on the proprietory interest which the citizen of the state might hold in this institution, in common with other property of the same description throughout the state.

§ 193. It has also been held that a captain of a United States revenue cutter on a station in the state of Pennsylvania was not liable to be rated and assessed for county taxes, as an officer of the United States, for his office. In this case, it was admitted that taxation was a sacred right, essential to government—an incident of sovereignty. That the right of legislation was co-extensive with the incident, to attach it upon all persons and property within the jurisdiction of a state; but that in our system, there were limitations upon that right. There was a concurrent right of legislation in the states and the United States, except as both are restrained by the constitution of the United States. Both were restrained upon this subject by express prohibitions in the constitution. And the states, by such as are necessarily implied where the exercise of the right by a state conflicts with the perfect execution of another sovereign power of the United States. That occurred whenever taxation by a state acted upon the instruments, emoluments and persons which the United States might use and employ, as necessary and proper means to execute their sovereign powers. The government of the United States was supreme in its sphere of action. The means proper to carry into effect the powers of the constitution were in congress. Taxation was a sovereign power in a state, but the collection of revenue by impost upon imported goods, and the regulation of commerce, were also sovereign powers in the United States. That congress

had power to lay taxes, duties, imposts, &c., and to regulate commerce; neither could be done without legislation. A complicated machinery of form, instruments, and powers must be established, and the better to secure the collection of duties revenue cutters, and officers to command them, were necessary. They were the means necessary to an allowed end; the end the great object which the constitution was intended to secure to the states in their character of a nation. That such officers were no less the means to carry into effect those great objects than the vessels or other instruments, neither of which could be taxed. To allow such a right of taxation to be in the states, would also, in effect, give to the states a revenue out of the revenue of the United States, to which they were not constitutionally entitled, either directly or indirectly. That the constitutionality of such taxation by a state, might be put upon its interference with the constitutional means which have been legislated by the government of the United States to carry into effect its powers, to lay and collect taxes, duties, imposts, &c. But that there was another ground upon which it might be put, that the power of the national government could only be executed by officers whose services must be compensated by congress. The allowance was in its discretion. The presumption was, that the compensation given by law was no more than the services were worth, and only such an amount as would secure from the officers the diligent performance of their duties. "The officers execute their offices for the public good. This implies their right of reaping from hence the recompense the services they rendered deserved, without that recompense being in any way lessened, except by the sovereign power from whom an officer derives his appointment, or by another sovereign power to whom the first has delegated the right of taxation over all the objects of taxation, in common with itself, for the benefit of

both. And no diminution in the recompense of an officer is just and lawful unless it be prospective or by way of taxation by the sovereignty who have a power to impose it, and which was intended to bear equally with all, according to their estate. The compensation of an officer of the United States was fixed by a law made by congress. It was its exclusive discretion to determine what should be given. It exercised the discretion and fixed the amount, and conferred upon the officer the right to receive it when it was earned. That a tax by a state upon the office diminished the recompense and conflicted with the law of the United States, which secured to the officer its entireness. It had such an effect, and hence such a law could not be constitutional.(*a*)

§ 194. The third power granted to congress is: To regulate commercē with foreign nations and *among the several states and with the Indian tribes*. This clause of the constitution has been frequently under consideration. In *Gibbon* v. *Ogden*,(*b*) the question arose, whether an act of the legislature of the state of New York, granting unto certain persons the exclusive right of navigating the waters of that state with steamboats, was in collision with the act of congress regulating the coasting trade, made pursuant to the constitution. It was held, that it was, and as the laws of congress thus made were supreme, the state laws must yield to that supremacy, although enacted in pursuance of powers acknowledged to remain in the state.

§ 195. It was held that the word "*commerce*," was not limited to *traffic*, to *buying* and *selling*, or the interchange of commodities. That it also comprehended navigation. That commerce was traffic, but it was also something more, it was intercourse. It was descriptive

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(*a*) *Dobbin* v. *Lake Erie Co.* 16 Peters, 435.
(*b*) 9 Wheat. 1.

of commercial intercourse between nations and parts of nations, in all its branches, and was regulated by prescribing rules for carrying on that intercourse. That the mind could scarcely conceive a system for regulating commerce which should include all laws concerning navigation, which should be silent on the admission of the vessels of one nation into another. That unless commerce included navigation the government of the Union had no direct power over that subject, and could make no laws prescribing what should constitute American vessels, or requiring them to be navigated by American seamen. This had been done and had been understood to be a commercial regulation. All America understood commerce to include navigation. It was so understood when the constitution was framed. The convention must have understood the word in that sense. This view was confirmed by the instrument itself. It was a rule of construction, that exceptions from a power mark its extent, as it would be absurd to except from a created power what was not granted. There were in the constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, which was evidence that those who made these exceptions understood the power to which they applied were granted. The constitution declared, "no preference shall be given by any regulation of commerce or revenue to the ports of one state over another." This clause was expressly applied to commercial regulations. The most obvious preference which could be given to one port over another in regulating commerce, related to navigation. Another clause, still more explicit, was: "Nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another." This power extended to commerce itself with foreign nations and among the several states, and with the Indian tribes. These words comprehend every species of commercial

intercourse between the United States and foreign nations; no trade could be carried on between them to which the trade did not extend. That commerce, as the word was used in the constitution, was a unit. If this was so in its application to foreign nations, it must be so throughout the whole sentence, unless there was some plain intelligible clause which altered it.

§ 196. The words, "*among* the several states," meant *intermingled with*, hence commerce among the states did not stop at the external boundary line, but might be introduced into the interior; not that the words comprehend that commerce which is completely internal, which is carried on between man and man, or between different parts of the same states, not extending to or affecting other states. The word *among*, though comprehensive, might properly be restricted to that commerce which concerns states *more than one*. The latter, congress had the power to regulate, whilst the completely internal commerce may be considered as reserved to the states.

§ 197. In the regulation of commerce with foreign nations, the power of congress did not stop at the jurisdictional lines of the several states. The commerce of the United States with foreign states was that of the whole Union. The power to regulate must be exercised wherever the subject exists. If it exists within the states, if foreign voyages may commence and terminate at a point within the state, then the power of congress might be exercised within a state.

§ 198. The power granted was a power to regulate, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, was complete in itself, might be exercised to its utmost extent, acknowledges no limitation other than that prescribed in the constitution. The sovereignty of congress, though limited to specified objects, was plenary as to those objects. The power over commerce with foreign

nations and among the several states was vested in congress as absolutely as it would be in a specific government, having in its constitution the same restrictions in its exercise of power as are found in the constitutions of the United States. This power comprehends navigation within the limits of every state in the Union, so far as that navigation may be in any manner connected with "commerce with foreign nations, or among the several states, or with the Indian tribes." It might pass the jurisdictional line of New York, and act upon the very waters to which the prohibition in this act applies. Indeed, it was by no means certain, but that the words "to regulate," imply, in their nature, full power over the thing to be regulated, and excludes, necessarily, the action of all others that would perform the same operation upon the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were in the states as well as those which are altered. A state law which comes in collision with an act of congress, which deprives a citizen of a right which such act entitles him to, whether such law was passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several states," or in virtue of a power to regulate their domestic trade or policy; in such case the state law must yield to the law of congress.

§ 199. The law of New York which was under consideration in this case, was held to conflict with the law of congress in relation to the license and enrolment of vessels, which declared that vessels enrolled as described in the act, and having a license in force, "and no others, shall be deemed ships or vessels of the United States, entitled to the privilege of ships or vessels employed in the coasting trade." The form of the license for carrying on the coasting trade given to the steamboat, as pre-

scribed by the law of congress, is, "license is hereby granted for the said steamboat (Bellona) to be employed in carrying on the coasting trade for one year from the date hereof." These were the words of the legislature, and conveyed an implied authority in the act, intended to give and operate as effectually as if they had been inserted in any other part of the act than in the license. The word "license" means permission or authority to do any thing; and if granted by one having power or authority to render it, transfers to the grantee the right to do it. The privilege thus granted could not be separated from the trade, nor could be enjoyed unless the trade might be prosecuted. The grant of the privilege would be an idle empty form, conveying nothing unless it conveyed the right to which the privilege is attached, and in the exercise of which its whole value consisted. Any other consideration of the word would be an apparent disregard of the intent of the act. As congress had the power to render the grant of this privilege and had exercised it, no state law could impair the right thus secured.

§ 200. This power of regulating commerce extends to navigation carried on by vessels exclusively employed in the transportation of passengers. This general grant of power comprehends all vessels. If none are excluded by the language none should be excluded by construction. The duty act applies to such vessels, and they are governed by the general law of navigation. This power also extends to vessels propelled by steam as well as those navigated by the instrumentality of wind and sails. The enrolment and license act authorized steamboats to be enrolled and licensed, when employed or intended to be employed only in a river or bay of the United States. This act demonstrates that they might be enrolled and licensed in common with vessels using sails.

§ 201. It was held, in this case, that state inspection laws, health laws, and laws for regulating the internal commerce of a state, and those which respect turnpike roads, and ferries, &c., are not within the powers granted to congress. Although inspection laws have a remote and considerable influence on commerce, the right to pass them was not denied from the power to regulate commerce. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the state. They form a portion of that immense mass of legislation which embraces everything within the boundary of the state not surrendered to the general government; hence inspection laws, quarantine laws, and health laws of every description, as well as laws regulating the internal commerce of the state, and those which respect turnpike roads and ferries, and may be exercised by the state. That no direct general power over these objects was granted to congress; and, consequently, they remain subject to state legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. It is obvious, that the government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the states, may use means that may also be employed by a state in the exercise of its acknowledged powers, that, for example, of regulating commerce within the state. If congress license vessels to sail from one port to another, in the same state, the act is supposed to be necessarily incidental to the power expressly granted to congress, and implies no claim of a direct power to regulate the purely internal commerce of a state, or to act directly on its system of policy. So, if a state, on passing laws on subjects acknowledged to be within its control, and

with a view to those subjects, should adopt a measure of the same character with one which congress might adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the state, and may be executed with the same means. All experience shows, that the same measure, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical, although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

§ 202. In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous state governments, which retain and exercise all powers not delegated to the Union—contests respecting powers must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers, would often be of the same description, and might sometimes interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other. The acts of congress passed in 1796 and 1799,(*a*) empowering and directing the officers of the general government to conform to, and assist in the execution of the quarantine and health laws of a state, proceed, it is said, upon the idea that these laws are constitutional. It is undoubtedly true that they do proceed upon that idea, and the constitutionality of such laws has never, so far as we are informed, been denied. But they do not imply an acknowledgment that a state may rightfully regulate commerce with foreign

(*a*) 2 U. S. Laws, 345; 3 U. S. Laws, 126.

nations, or among states; for they do not imply that such laws are an exercise of that power, or enacted with a view to it. On the contrary, they are treated as quarantine and health laws, are so denominated in the acts of congress, and are considered as flowing from the acknowledged power of a state, to provide for the health of its citizens. But as it was apparent that some of the provisions made for this purpose, and in virtue of this power, might interfere with and be affected by the laws of the United States, made for the regulation of commerce, congress, in that spirit of harmony and conciliation, which ought always to characterize the conduct of governments standing in the relation which that of the Union and those of the states bear to each other, has directed its officers to aid in the execution of these laws; and has, in some measure, adapted its own legislation to this object, by making provisions in aid of those of the states. But, in making those provisions, the opinion is unequivocally manifested, that congress may control the state laws, so far as it may be necessary to control them, for the regulation of commerce.

§ 203. Chief Justice Marshall on the subject says:— "It seems to be settled that a statute health law which may, in its consequences, impair or impede the navigation of a stream which previously had been navigable, is not within the restriction contained in this clause of the constitution, unless congress shall have enacted some law regulating the navigating of such stream." This principle was settled in the case of *Wilson and others* v. *The Black Bird Creek Marsh Company.*(*a*) This company, incorporated in Delaware in 1822, were authorized and empowered to construct a dam across said creek. They proceeded to erect such dam, by which the navigation of the creek, which before was navigable, was

(*a*) 2 Peter's R. 245.

impeded. The constitutionality of this act was involved in the case. It was contended on the one hand that the constitutional powers of congress to regulate commerce included navigation, and that the states were by this provision deprived of the power of obstructing a navigable river. On the other, it was contended that the power to regulate commerce, did not interfere with the rights of the state over the property within its boundaries. That while the waters of the United States belonged to the whole people of the nation, this creek continued subject to the power of the state. That it was one of those sluggish, reptile streams which destroyed the health of the inhabitants; and that the nature of the dam was to draw off the pollution. That as congress had not legislated upon the subject of this stream, the power given to it to regulate commerce did not extend to such a case. It was held, that the act of assembly by which the plaintiffs were authorized to construct their dam, showed plainly that this is one of those many creeks, passing through a deep, level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, were undoubtedly within those which are reserved to the states. But, it was said, the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. To this it was replied, but this abridgment, unless it comes in conflict with the constitution, or a law of the United States, was an affair between the government of Delaware and its citizens, of which the court could take no cognizance. The counsel for the plaintiffs in error insisted that it comes in conflict

with the power of the United States, "To regulate commerce with foreign nations, and among the several states." It was admitted that if congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern states; the court would feel not much difficulty in saying that a state law coming in conflict with such act, would be void. But congress has passed no such act. The repugnancy of the law of Delaware to the constitution was placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several states; a power which has not been so exercised as to affect the question.

§ 204. The following case has been held to be within this constitutional restriction: An act of the legislature of Maryland was passed requiring all importers of foreign goods by the bale, and package, &c., and all other persons selling the same by wholesale, bale or package, &c., to take out a license, for which they should pay fifty dollars, and in case of neglect or refusal to take out such license, subjecting them to certain forfeitures and penalties. In *Brown* v. *The State of Maryland*,(*a*) the constitutionality of this law came before the federal court, and it was insisted that it was repugnant to the provision of the constitution of the United States, in which it was declared, that "no state shall, without the consent of congress, lay any impost, or duty on imports or exports, except what shall be necessary for executing its inspection laws;" and also to that in which it was declared, that congress shall have power "to regulate commerce with foreign nations, among the several states, and with the In-

(*a*) 12 Wheat. R. 419.

dian tribes." It was held, that imports or duties was a custom or tax levied on articles brought into the country, and was most usually secured before the importer was allowed to exercise his right of ownership over them. That it would not be less an impost or duty on the articles if it were levied on them after they were landed. That the policy and consequent practice of levying or securing a duty before or on entering the port, did not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confined it. "Imports" are things "imported;" they are the articles themselves which are brought into the country. The words taken in their literal sense were not confined to a duty levied while the article was entering the country, but they extended to a duty levied after it had entered the country.

§ 205. We had occasion in another capacity, in the case of *The People* v. *Huntington*,(*a*) to consider this question. We then took occasion to examine the question somewhat minutely, and then arrived at the conclusion, and remarked, that, "Antecedent to the establishment of the federal government, the colonies had full power, with the assent of the mother country, to legislate fully respecting their internal affairs, and of course to prescribe the mode and manner in which trade should be carried on in their respective territories, and to adopt such police regulations as each might deem expedient. Under the articles of confederation, this power to regulate internal trade and commerce and to establish police regulations, remained unimpaired with the several states. There was nothing in those articles at variance or in conflict with such state legislation over matters having reference to the internal trade of the states. Indeed the only qualification of the right of the states to lay imposts or duties was they should not

(*a*) 4 New York Legal Observer, p. 187.

lay any such as should interfere with any stipulations in treaties entered into by the United States, in pursuance of any treaties already proposed by congress to the courts of France and Spain. Thus it will be perceived, under the articles of confederation, there is no doubt of the power of the states down to the adoption of the federal constitution, to regulate the internal commerce of the states. It is also equally clear, that unless the power to regulate the trade of a state which is purely internal, and to establish police regulations, having relation to and bearing upon such trade, is vested in the federal government under this general power to regulate commerce, as that government is one of the delegated powers, it does not possess it, unless it is one necessarily incident to the due execution of the powers expressly given. Has this power under the general grant of power to congress been taken away from the states? In the consideration of this question we shall briefly allude to the defects existing under the articles of confederation, and the reasons which induced the framers of the constitution to clothe congress with the power to regulate commerce. Under the articles of confederation each state had power to pursue a system of commercial polity peculiar to itself, and such an one as occasioned destructive preferences and exclusions, which begat great discontent among the several states. Those states which were peculiarly favorably situated in reference to the commerce of the nation, in some instances endeavored to secure exclusive benefits to their own citizens by regulations, the infractions of which on the one side, and the efforts to repel and prevent them on the other, it was thought might lead to outrage, reprisals, and wars among the several states. It was believed that the opportunity which some states would have in rendering others tributary to them by commercial regulations, would be impatiently sub-

mitted to by tributary states. A very material and essential object of this power was the relief of those states which, from their peculiar geographical position, must import and export through other states, from the improper contributions which might be levied upon them by the latter. Were the several states at liberty to regulate the trade between state and state, means might be resorted to to load the articles of import and export during their passage through their jurisdictions, with duties which would fall with peculiar severity on the citizens of the interior states, which would be a constant source of uneasiness, discontent and animosity, which would seriously interrupt the public tranquility, as it would naturally stimulate the injured parties to a spirit of resentment and retaliation which might divert the commerce of the country from the ordinary and natural channels, so as seriously to affect the commercial interest of all the states of the confederacy. The experience of the American states, during the confederacy, had evinced that such arrangements could and would be made, under the stimulating influence of local interest and the desire of undue gain. Instead of acting as a nation in regard to foreign powers, the states individually commenced a system of restraint upon each other to such an extent that the interest of foreign powers was promoted at their expense. Whenever one state imposed high duties on the goods of a foreign power, to countervail the regulation of such powers, the next adjoining state imposed lower duties to invite these articles into their ports, that they might be transmitted thence into other states, securing the duties to themselves. This contracted policy in some of the states was soon counteracted by others. Restraints were immediately laid on such commerce by the suffering states, and thus a state of affairs, disorderly and unnatural, grew up, the necessary tendency of which was to destroy the Union itself.

It had also been found that without this power to regulate commerce among the states, the power of regulating foreign commerce would be incomplete and ineffectual. For if the respective states were left free to regulate commerce, the laws of the Union in regard to this subject, whether for revenue, for restriction, for relation, or for encouragement of domestic products, might be evaded at pleasure, or rendered impotent. These, among other reasons, induced the convention to vest in congress the power to regulate commerce among the several states. The past experience of the nation under the articles of confederation, had demonstrated the necessity of vesting in the federal government also, the power to regulate and to exert a general superintendence over foreign commerce. The want of such a power in that government had operated as a bar to the formation of beneficial treaties with foreign powers, and had also given occasion of dissatisfaction between the states. Foreign powers acquainted with our institutions, had declined to enter into stipulations with the federal government, by which they should concede on their part, important commercial privileges, knowing as they did, that the engagements on the part of the Union, might at any moment be violated by any member of the confederacy. Even the government of England, with which this country, from its position and productions, must ever sustain most intimate and important commercial relations, would only make provisions for a temporary intercourse with this country, on the ground that such had been found to answer every purpose essential to the commerce of Great Britain, and had intimated an adherence to that policy, until the federal government should acquire a greater consistency. Although several states had endeavored by separate prohibitions, restrictions, and exclusions, to influence the conduct of other nations in this particular, it had failed for the want of concert, arising from the

want of general authority, and from clashing and dissimilar views in the several states. To overcome these barriers to the commercial relations of the country, it was deemed indispensable to place the power over foreign commerce under the exclusive and general supervision of the federal Union.(*a*) Our only object in thus alluding to the difficulties arising under the confederation, has been, if possible, to discover and deduce therefrom the spirit, scope and design of these clauses of the federal constitution, to the end of giving to those clauses under consideration such a construction as will secure the end designed to be attained by those constitutional provisions and effectuate the spirit of that sacred instrument. The object of the powers conferred on the government of the Union, and the nature of the conflicting powers which remain in the states, should always be taken into view in aid of an exposition of those particular clauses of the constitution. Courts in construing that instrument upon sound principles of construction, ought not to carry the words of the prohibition beyond the object which the constitution is intended to secure. That object is best ascertained by an inquiry into the causes which conspired to lead to this constitutional delegation of power to congress. He bids fairest to a just interpretation, who keeps constantly in view the mischief and inconveniences which existed under the old confederation, and which were designed to be obviated by these constitutional provisions. From this succinct review, we think we may fairly infer, that the object of the constitution will be attained if we give to the federal government the exclusive power to regulate the external commerce of the nation and of the respective states, to determine the terms and conditions upon which, and to

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(*a*) Federalist, Nos. 7, 11, 23, 42. Story's Commentaries on the Constitution of the United States, vol. ii. 511, 512.

prescribe the regulations by which the commodities and products of one state should be permitted to be introduced into another, or exports should be made from state to state, or through the several territorial sovereignties composing the confederacy, or the commodities of foreign nations introduced into the country, and to control and regulate such external commerce during the entire period in which the process of importation or exportation and introduction and incorporation among the great mass of property of the respective states is going on; and if it is held that such control should cease whenever the act of such importation, introduction and incorporation had been fully accomplished, and if we deny to the state sovereignties all interference, either by impost, duties, or other restrictions, or regulations with such commerce, while these processes of importation, introduction, and incorporation, is going forward. The language is "*commerce among the several states.*" It has been held that the word "*among*" means intermingled with the several states—that commerce among the states may, and does not stop at the external boundary line of a state, but may be introduced into the interior, so long as these processes are going on, and until fully completed, and down to the time of its incorporation with the great mass of the property of the state. But the moment the ends of importation or exportation cease, then it ceases to be commerce among the several states, and becomes the commerce of a state. It then assumes a character which is purely internal between man and man in a single state, or between different parts of the same state, and not extending to or in any way affecting other states. Its regulation by state legislation after thus introduced and incorporated, never had been either the cause of conflict or complaint, nor was its regulation under such circumstances one of the evils which it was the object of the constitution to guard against, or one of the defects under

the articles of confederation which it was designed to remedy by this constitutional provision. The distinction above alluded to, and such a line of demarcation has, we think, been recognized in all the cases where this question has come under the consideration either of our state or the federal courts." "But it is said that if excise laws are held to be constitutional, we must admit the power of the state to impose duties on articles of foreign importation, and that such duties may be imposed to such an extent as to prevent all sales of the commodity imported —which in effect would be equivalent to an express prohibition upon importations, as it would defeat the object of importations, for without sales the right of importation would be worse than useless—and that if the states may regulate the sale of one article of commerce, they may do the same as to all others; which would in effect defeat these constitutional provisions. This does not, as we can discover, necessarily follow—but if it did, an answer to this argument is, that the states have never delegated to congress the power to undertake that any commodity introduced into the country shall meet with a sale; nor are they under any obligation to secure a market for the article when introduced. Congress has delegated to it the power to prescribe the subjects of importation, and the mode, manner and means of introduction, and when that is done, the commodities thus introduced must take their chance with all other property of the state, in finding a market. The states may regulate such sales unless expressly or impliedly restricted. If we are right in the position that when that introduction is consummated, the power of congress over the subject is spent, and the article then loses its character as an import—then any duty or tax imposed upon it when thus incorporated into the mass of the property of a state, is not an *impost* or *duty* on *imports or exports*. Nor under such circumstances are the powers of the state limited by the con-

stitution. It also should be borne in mind that a state law should not be considered as subject to a constitutional objection because it may in its operation incidentally or remotely have some influence upon a subject matter over which power is delegated to congress. For such a construction would include state legislation in reference to almost all subjects of internal police which have uniformly been conceded as within the powers reserved to state sovereignties. For most internal police regulations have a remote bearing on the commerce of the nation. It is not enough to bring an act within the circle of this constitutional prohibition that it may in its effects lessen the extent of sales in the country of a particular commodity. But to render such an act unconstitutional, there must be some direct conflict or repugnancy or incompatibility with the power granted to congress. In the language of Chief Justice Parker, "It must either in its actual exercise, or in its nature, be of a character to control, defeat, limit or impair some power of the general government, or interfere with its action, so that if admitted, that power could no longer be efficacious and adequate to accomplish the object for which it was given. If it merely operates upon the subject matter, but not in such a manner to show a plain incompatibility, a direct repugnancy, or an extreme practical inconvenience, it is not unconstitutional, because there may be a possible or potential inconvenience." The power attempted to be exercised under this statute, is not one resorted to for the purpose of revenue, but has always been regarded in the light of a mere police regulation, having for its aim the welfare, health, and morals of our citizens, limiting and controlling the manner and circumstances, under which, a traffic which has ever been productive of a deep and wide-spread moral pestilence shall be regulated, and designating the individuals to whose hands shall be committed the right to vend a

commodity, which ever has been, and it is to be feared, ever will be, a most pestilential and blighting curse—destructive of the peace, happiness and prosperity of the citizens of the state; a power which congress never has, and never can exert, without trampling upon state sovereignties, and resorting to an act of the most daring and gross usurpation. That statutes of this character have at all times been regarded simply in the light of mere police regulations, is evident from the whole history of legislation upon this subject in this country, and would be most apparent, should we examine all such statutes in detail, which have been enacted and continued in force in almost all the original states of the Union, as well before as since the adoption of the federal constitution. It would take too much space to refer to them at this time. Suffice it to say, that we find as early as 23d March, 1660, a similar statute was passed in the colony of Virginia, which evidently was regarded in that light, for its preamble declares it to be, "*For preventing of many disorders and riots in ordinances and other places where drink is retailed.*" So long as the sovereignty of a state, in the exercise of this power, keeps strictly within what is a mere police regulation, without any attempt to prohibit imports, or to affect such articles during the act of importation and introduction into the mass of the property, and then only undertakes to regulate the manner of conducting the sale, so long we think they are without the constitutional circle of prohibition. But should a state attempt to prohibit the sale of imported articles within its limits, or tax articles the produce of another state, beyond the rates of similar articles produced within its own borders, then we agree with Chief Justice Parker, that it would be readily seen that such legislation was not a regulation of internal police merely, but that its design and effect would be the regulation of foreign commerce and commerce among the states; and under

whatever name or pretence it might be passed, it must be regarded as a fraudulent attempt to over-ride the constitution, and hence could not be sustained." "As this statute (relating to excise) is not within either the spirit, scope or design, of those constitutional restrictions, or within the mischiefs at which they were aimed, in our opinion the law is constitutional. Similar laws have been established in almost all the several states of the Union, and have been acquiesced in, both by the state and national governments, since the period of the federal constitution, and tacitly, until within a very recent period. In fact, this affords a strong practical construction, which forms an unbroken chain commensurate with the adoption of the constitution, and acquiesced in, and acted upon, since that time, until within the last year. In three states of the Union, New Hampshire, Massachusetts and Indiana, similar laws have received the sanction of the highest judicial tribunals of those states, and have been supported by an array of talent and sound logical reasoning, alike creditable to their authors and the courts over which they have the honor to preside."

§ 206. In the case last cited, we arrived at the conclusion, that our excise laws were not repugnant to the constitution, either as it respects the clause now under consideration, or the second clause of sec. 10 of art. I. That the power of congress to regulate commerce extended only to the purely external commerce of the states, and had no application to commerce which was purely internal commerce of a single state. That the power of congress over commerce was confined to the period of time during which the act of importation, introduction and incorporation of a foreign commodity into the mass of the property of the state was going on. That when the act of importation, introduction and incorporation into the mass of the property of a state was

fully accomplished, the object of the constitution was attained, the power of congress over such foreign article was spent, and that the article then, like all other property in a state, was subject to the regulating control of the state sovereignties where situate. The power of state legislatures to pass such kind of police regulations has, after much agitation, been authoritatively settled by the supreme court of the United States in several cases which are found reported in 5 Howard's U. S. R. 504. In the cases there reported it was held, that a law of Massachusetts providing that no person shall presume to be a retailer or seller of wine, brandy, rum, or other spiritous liquors, in a less quantity than twenty-eight gallons, and delivered and carried away at one time, unless he is first licensed as a retailer of wine and spirits; and that nothing in the law should be so construed as to require the county commissioners to grant any license when in their opinion the public good did not require them to be granted. And that a law of Rhode Island forbidding the sale of rum, gin, brandy, &c., in a less quantity than ten gallons, although in this case the brandy which was sold, was duly imported from France into the United States, and purchased by the party indicted from the original importer. And the law of New Hampshire, imposing similar restrictions to the foregoing upon licenses, although in this case the article sold was a barrel of American gin, purchased in Boston, and carried coast-wise to the landing at Piscataqua bridge, and there sold in the same barrel,—were none of them inconsistent with this clause of the federal constitution;(*a*) and they were all sustained as valid acts of state legislation by the federal court. Thus in regard to such laws there now can remain no question of their

(*a*) See also, *Wynne* v. *Wright*, 1 Dev. & Bat. Law R. 19.

constitutionality, or of the power of the state legislatures to legislate upon such subjects.

§ 207. The following acts have been held not to be in conflict with this clause in the federal constitution. A state statute imposing a penalty on masters of vessels who should suffer alien passengers to land without giving bonds, when required by the Mayor of New York, to indemnify the corporation of New York from all expense and charge incurred for the maintenance and support of the person so imported; in case such person should within two years become chargeable to the corporation.(*a*) An act of the legislature requiring the master of every vessel arriving in New York from any foreign port, or from any port of any of the states of the United States other than New York, under a penalty prescribed in the law, to make a report in writing containing the names, ages, and last legal settlement of every person whom he shall have received on board the vessel commanded by him during the voyage—was held not to be a regulation of commerce, but of police; and being so, it was passed in the exercise of the constitutional powers of the state.(*b*)

§ 208. In the case last cited, it was held that the state of New York possessed the power to pass such a law, anterior to the federal constitution. In support of this proposition the court cited the language of Vattel:(*c*) "The sovereign may forbid the entrance of his territory either to foreigners in general, or in particular cases, or to certain persons, or for certain particular purposes, according as he may think it advantageous to the state." "Since the lord of the territory may whenever he thinks

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(*a*) *New York* v. *Staples*, 6 Cowen's R. 169.
(*b*) *The Mayor, &c. of N. Y.* v. *Miln*, 11 Pet. R. 102.
(*c*) Book 2, ch. 7, sec. 94.

proper, forbid its being entered, he has no doubt a power to annex what condition he pleases to the permission to enter."(*a*) The act was intended to prevent the state being burthened by an influx of foreigners, and to prevent their becoming paupers. Such an object was within the constitutional powers of the state, although a portion of its powers had been surrendered to the general government. That both the ends and the means used were within the competency of the state.

§ 209. This case was distinguished from that of *Brown* v. *The State of Maryland*, as persons are not the subject of commerce, and not being imported goods, they did not fall within the reasoning in that case founded upon the construction of a power given to congress to regulate commerce, and the prohibition to the states from imposing a duty on imported goods. The court placed their decision upon the ground "That a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the constitution of the United States. That by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained in the manner just stated. That all those powers which relate to merely municipal legislation, or what may perhaps more properly be called *internal police*, are not thus surrendered or restrained, and that consequently, in relation to those, the authority of a state is complete, unqualified, and exclusive."

(*a*) Book 2, ch. 8, sec. 100.

§ 210. The court said, that if it were to attempt to define statutes which came within this description, they should say, "that every law came within this description which concerned the welfare of the whole people of a state, or any individual within it, whether it related to their rights or their duties, whether it respected them as men or as citizens of the state, whether in their public or private relations, whether it related to rights of person or of property, of the whole people of the state or any individual within it, and whose operation was within the territorial limits of the state, and upon the persons and things within its jurisdiction. But that the meaning could be better illustrated by exemplification, than by definition.

§ 211. It has also been held, that a statute of Kentucky of 1824 and 1828, which forbid slaves from being carried away as passengers in boats on the Ohio river, which is the boundary line of the state, did not conflict with the concurrent jurisdiction of other states, nor with the free and common use of that river, nor with the power of congress to regulate commerce.(*a*)

§ 212. In *Coxe* v. *The State*,(*b*) it was held, that an act of the legislature making it a penal offence to erect or continue any obstruction in certain navigable streams, did not come within this constitutional power secured to congress to regulate commerce. It was, in the case last cited, held, that the several states in the Union were confederated together for national purposes, yet they were, in all other respects, independent sovereignties. They retain their individual sovereignty, and with respect to their municipal regulations are sovereign in every sense of the word, and independent of each other and of the federal government, except so far as those

(*a*) *Church* v. *Chambers*, 3 Dana's Rep. 274.
(*b*) 3 Blackford's Indiana Rep. 19.

sovereign rights and powers may have been surrendered or abridged by the federal constitution, and by compact. They are not excluded from the exercise of any power belonging to free and independent sovereignty, except in three cases: 1st, where a power is granted in exclusive terms to the general government; 2d, where the states were expressly prohibited from the exercise of any power; and 3d, where a power is granted to the general government, the contemporaneous exercise of which by the states would be incompatible. That this statute did not fall under either of these heads. That it did not conflict with the power of congress to regulate commerce. That congress had passed no act controling state legislation over those streams, and it was enough that no such act had been passed. That so long as the exercise of that power by congress lay dormant, and was not so exerted, it could not control or restrain state legislation; and even if the United States had so exerted this power, it would only control and restrain such state legislation as should conflict with the congressional statutes. To oust the state of its sovereign right to legislate for the protection of those streams, by punishing persons obstructing them, and removing obstructions when necessary, it must be expressly shown that that power had been expressly surrendered by treaty, grant, or compact, or that it was in conflict with some prohibitory provision of the constitution of the United States, or that its exercise was incompatible with some jurisdiction of the United States, which they were in the immediate exercise of, and which had been granted to that government.

§ 213. In *Biddle* v. *The Commonwealth*(*a*) it was held, that an act of the legislature which imposed a duty on

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(*a*) 13 Serg. & Rawle, 405.

articles of foreign merchandise was not in conflict with this clause of the constitution. That the act in question did not, in any manner, relate to commerce between the several states.

§ 214. The next power expressly conferred upon congress is, to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcy throughout the United States. A question has frequently been raised, whether the power of congress, under the latter clause, was vested exclusively in congress, and that too, whether congress exerted the power or not. The doctrine that has finally obtained on this subject is, that this power is not necessarily in all cases exclusive in congress. That until congress exerts the power, the states are at liberty to exercise it in its full extent, with the qualification, however, that they cannot pass insolvent or bankrupt laws which shall discharge the obligation of antecedent contracts, or to discharge contracts made with a citizen of another state, nor any contracts made in another state. But when congress has exerted the power, and acted upon the subject to the extent of the national legislation, the power of the states is controlled and limited.(*a*) The doctrine has been fully established, that the right of the states to pass a bankrupt law is not taken away by the mere grant of this power to congress; it is not extinguished; it is only suspended by the enactment of a general bankrupt law. The repeal of such a law of congress does not confer this power on the states; but it removes a disability to its exercise, which was created by congress enacting such a law.(*b*) Just as soon as a bankrupt act is passed by congress, and goes into effect,

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(*a*) *Ogden* v. *Saunders*, 12 Wheat. 213, *et seq.* *Sturges* v. *Crowningshield*, 4 Wheat. 122. *Boyle* v. *Zacharie*, 6 Peters, 348. Story on the Constitution, vol. iii. p. 14, §§ 1109, 1110.

(*b*) *Sturges* v. *Crowningshield*, 4 Wheat. 122.

it *ipso facto* suspends all action in future cases arising under state insolvent laws, where the insolvent persons are within the purview of the bankrupt act.(*a*) But this rule applies only to future cases, that is, to cases where no proceedings under any state insolvent law had been instituted before the act of congress took effect. Different considerations would prevail where proceedings under state insolvent laws had actually been commenced before an act of congress on this subject should have gone into effect. The rule itself is founded upon the idea that both systems cannot be in operation or apply at the same time to the same persons. And where the state and national legislation upon the same subject and the same persons come in conflict, the supremacy of the national law must prevail and suspend the operation of the state laws.(*b*) In the case last cited, Mr. Justice Story says: "In the case of *Sturges* v. *Crowningshield*, Mr. Justice Washington and myself were of opinion, that the power to pass a bankrupt law was exclusively vested in congress by the constitution of the United States; and that no state could pass a bankrupt law, or an insolvent law having the effect of a bankrupt law, where it discharged the debtor from the obligation of his prior contracts. Mr. Justice Todd was absent, from indisposition, and therefore did not act in the case. The other four members of the court (constituting a majority) concurred in the decision, which was pronounced by Chief Justice Marshall. But all the court were agreed, that when congress did pass a bankrupt act it was supreme, and that the states must yield to it, and could no longer operate upon persons or cases within the purview of such act. The enactment of such an act suspended the state laws on the same subject, and created a disability in the

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(*a*) *Ex parte Eames*, 2 Story's R. 325. (*b*) Ib.

states to exercise powers of the like nature. The court went further, and asserted that the bankrupt act of 1800, ch. 19, had that very operation, except so far as the sixty-first section of the act modified or allowed the exercise of the power by the states. The case of *Ogden* v. *Saunders*,(*a*) fully recognized and has always been understood to confirm and settle the same principle.

§ 215. The next power of congress is to coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures. This power under the federal constitution, as to currency, &c., is exclusive in congress, and not only so under this clause, but, as will be seen, there is an express prohibition to the states under another clause in the constitution. A state cannot do that which the federal constitution declares it shall not do. It cannot "coin money," nor can it incorporate any number of individuals and authorize them to coin money. Such an act would be as much a violation of the constitution as if money were coined by an officer of the state, under its authority. The act being prohibited it cannot be done directly or indirectly.(*b*) But as it regards the latter clause, that relating to weights and measures, congress has not as yet ever exercised the power, and it has been supposed that the state legislatures possess the power to fix their own weights and measures.(*c*)

§ 216. Another of the express powers of congress is, to provide for the punishment of counterfeiting the securities and current coin of the United States. Mr. Justice Story thinks this power also one exclusive of the states, on the ground that it is one of the appropriate means to

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(*a*) 12 Wheat. R. 213, 264, 269, 273, 276, 278, 296, 311, 314.

(*b*) *Briscoe* v. *The Bank of the Commonwealth of Kentucky*, 11 Peters, 257; see also *Fox* v. *The State of Ohio*, 5 Howard, 410.

(*c*) Story, § 1117.

carry into effect other delegated powers.(*a*) We are not aware that this question has been judicially determined. It has been held that the power conferred upon congress by the fifth and sixth clauses of the eighth section, to wit, "to coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures," to provide for the punishment of counterfeiting the securities and current coin of the United States, does not prevent a state from passing a law to punish the offence of circulating counterfeit coin of the United States. That the two offences of counterfeiting the coin and passing counterfeit money were essentially different in their character. That the former was an offence directly against the government, by which individuals might be affected; the latter was a private wrong by which the government might be remotely, if in any degree, reached.(*b*)

§ 217. In the case last cited it was contended, for the plaintiff, that such a statute of Ohio was repugnant to the fifth and sixth articles of the constitution, which invests congress with the power to coin money, regulate the value thereof and of foreign coin, and to provide for the punishment of counterfeiting the current coin of the United States; that these clauses embrace not only what their language directly import, and all other offences which may be denominated offences against the coin itself, such as counterfeiting, scaling or chipping it, or debasing it in any mode, but that they embrace other offences, such as frauds, cheats, or impositions between man and man, by intentionally circulating or putting upon any person a base or simulated coin. On behalf of the state of Ohio, it was insisted, that this was not the correct construction to be placed upon the

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(*a*) Story, § 1118.

(*b*) *Fox* v. *The State of Ohio*, 5 Howard, 410.

clauses of the constitution in question, either by a natural and philological interpretation of their language, or by any real necessity for the attainment of their objects; and that if any act of congress should be construed as asserting this meaning in the constitution, and as claiming from it the power contended for, it would not be a law passed in pursuance of the constitution, nor one deriving its authority regularly from that instrument. The court held, it was manifest that the language of the constitution, by its proper signification, was limited to the facts, or to the faculty in congress of coining and of stamping the standard of value upon what the government creates or shall adopt, and of punishing the offence of producing a false representation of what may have been so created or adopted. The imposture of passing a false coin, creates, produces, or alters nothing; it leaves the legal coin as it was; it affects its intrinsic value in no wise whatever. The criminality of the act consists in obtaining for a false representative of the true coin that for which the true coin alone is the equivalent. There exists an obvious difference not only in the description of these offences, but also in character. The former is an offence directly against the government, by which individuals may be affected. The other is a private wrong, by which the government may be remotely, if in any degree, reached. A material distinction had been recognized between the offences of counterfeiting the coin and of passing base coin, by a government which may be deemed sufficiently jealous of its authority, sufficiently vigorous too in its penal code. Thus in England, the *counterfeiting* of the coin is made high treason, whether it be uttered or not, but those who barely utter false money are neither guilty of treason nor of misprision for treason. If A counterfeit the gold or silver coin, and, by agreement before such counterfeiting, B is to receive and vend the money, he is an aider and abet-

tor to the act itself of counterfeiting, and consequently a principal traitor within the law. It would follow from these views, that if within the power conferred by the clauses of the constitution above quoted, could be drawn the power to punish a private cheat effected by the means of a base dollar, that power certainly could not be deduced from either the common sense or the adjudicated meaning of the language used in the constitution, or from any apparent or probable conflict which might arise between the federal and state authorities, operating each upon these distinct characters of offence. If any such conflict could be apprehended, it must be from some remote, and obscure, and scarcely comprehensible possibility, which can never constitute an objection to a just and necessary state power. The punishment of a cheat or misdemeanor practised within the state, and against those whom she is bound to protect, was peculiarly and appropriately within her functions and duties, and it was difficult to imagine an interference with those duties and functions which would be regular or justifiable.(*a*)

§ 218. The next grant of power is, "To establish post offices and post roads." There has not as yet, as we are aware, been any decision upon the question as to whether this power is exclusive in congress, or concurrent in the states. Some deem it concurrent, and that upon the ground that there is nothing in the constitution, or in the nature of the thing itself, which may not be exercised by both governments at the same time, without prejudice or interference. But Mr. Rawle is of the opinion that this power is exclusive in congress, so far as it relates to the conveyance of letters. Mr. Justice Story deems it a question of but little importance, as it

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(*a*) See also *Chess* v. *State*, 1 Blackf. 198. *State* v. *Antonio*, 3 Wheeler C. C. 508. *State* v. *Tutt*, 2 Bailey, 44. *White* v. *Commonwealth*, 4 Bin. 418.

is admitted on all sides, that it can be exercised only in subordination to the power of congress even if it be concurrent in the states; and that is highly improbable that any state will attempt any exercise of the power, considering the difficulty of carrying it into effect without the co-operation of congress.(*a*).

§ 219. The next power of congress is, "To promote the progress of science, and the useful arts, by securing for limited times, to authors and inventors the exclusive right to their respective writings and discoveries." It has not yet been judicially determined whether this power is exclusive or concurrent; but it has been supposed that states may legislate upon this subject, provided their acts do not contravene the acts of congress on the same subject, and there is but little doubt that, exclusive of authors and inventors, states have power to grant exclusive rights to the possessor or introducer of an art or invention not claimed under a right as inventor, but introduced from abroad.(*b*)

§ 220. The next power of congress is, "To constitute tribunals inferior to the supreme court." This power, from its very nature, must of necessity be exclusive, as no one but the federal legislature, acting as the only legally constituted legislative body of the Union can constitutionally create a judicial tribunal for the federal government, of which it is the only legally constituted representative, so far as its creative power is concerned.

§ 221. The next powers granted to congress are: "To define and punish piracies and felonies committed on the high seas, and offences against the law of nations." Whether this power is exclusive or concurrent, is not yet determined. "To declare war, grant letters of

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(*a*) Story on Constitution, sec. 1145.

(*b*) See *Livingston* v. *Van Ingen*, 9 J. R. 507.

marque and reprisal, and make rules concerning captures on land and water." This power must be regarded as exclusive in congress, and so far as declaring war and granting letters of marque and reprisal, the states are expressly prohibited by another clause in the constitution. "To provide and maintain a navy." This clause has received no judicial construction. "To make rules for the government and regulation of the land and naval forces." This, as well as the former, probably may be regarded as exclusive.

"To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions." No judicial construction has been put on this clause, as we are aware of.

§ 222. The next grant of power is, "To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress." It is supposed that where congress does not exercise this power by acting under it, the power is concurrent in the states; and that under such circumstances they might act to the utmost extent of sovereignty. But the governing the militia when in the actual service of the United States, must be construed as exclusive. State courts-martial may inflict, but cannot add to or diminish the punishment inflicted by acts of congress upon military delinquents.(*a*)

§ 223. The next grant of power is, "To exercise exclusive legislation in all cases whatsoever, over such district, (not exceeding ten miles square,) as may by cession of particular states, and the acceptance of con-

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(*a*) *Houston* v. *Moore*, 5 Wheat. 1; Story on Const. sec. 1209, and cases there cited.

gress, become the seat of government of the United States, and to exercise like authority over all places purchased, by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings." Under this clause, after an act of cession to the United States, the jurisdiction of the states over such territory ceases; and the inhabitants of those places thus ceded, cease to be inhabitants of the state, and can no longer exercise any civil or political rights under the laws of the state. In accordance with this principle, in the case of *The Commonwealth* v. *Clary*,(*a*) it was held, that the courts of the commonwealth could not take cognizance of offences committed upon lands in the town of Springfield, which had been purchased by the United States for the purpose of erecting arsenals, &c., to which the consent of the commonwealth was granted by the statute of 1798. The court in that case held, that although the consent of the commonwealth to the purchase of this territory by the United States had a condition annexed to it, that civil and criminal process might be served therein by officers of the commonwealth, that this condition was made with a view to prevent the territory from becoming a sanctuary for debtors and criminals; and that from the subsequent assent of the United States to this condition, evidenced by their making the purchase, it resulted that the officers of the commonwealth, in executing such powers, act under the authority of the United States: that no offences, committed within that territory, were committed against the laws of that commonwealth, nor could such offences be punished by the courts of the commonwealth, unless congress should give them jurisdiction: that the laws of

(*a*) 8 Mass. R. 72.

the commonwealth had no force within such territory, and that the inhabitants thereof could not exercise any civil or political privileges under the laws of Massachusetts. That such a consequence necessarily followed, but that no hardship was thereby imposed on those inhabitants, because they were not interested in any elections made within the state; nor were they held to pay any taxes imposed by its authority, nor bound by any of its laws.(*a*)

§ 224. In the case of *The United States* v. *Cornell*,(*b*) Mr. Justice Story, in discussing the question of state jurisdiction being ousted, says:—"The constitution of the United States declares, that congress shall have power to exercise *exclusive legislation*, in all cases whatsoever, over all places purchased *by the consent of the legislature of the state* in which the same shall be, for the erection of forts, &c. When, therefore, a purchase of lands for any of these purposes is made by the national government, and the state legislature has given its consent to the purchase, the lands so purchased by the very terms of the constitution, *ipso facto*, fall within the exclusive legislation of congress, and the state jurisdiction is completely ousted." He held that this was the necessary result, for exclusive jurisdiction was attendant upon exclusive legislation; and the consent of the state legislature was, by the very terms of the constitution, by which all the states were bound, and to which all were parties, a virtual surrender and cession of its sovereignty over the place. That it was under the like terms in the same clause of the constitution, that exclusive jurisdiction was now exercised by congress in the District of Columbia: that if exclusive jurisdiction and exclusive legislation did not imply the same thing, the state could

(*a*) See also, 1 Hall's Journal of Jurisprudence, 53.

(*b*) 2 Mason's R. 63.

not cede, nor the United States accept for the purposes enumerated in the clause, any exclusive jurisdiction. But if there has been no cession by the state of the place, although it has been constantly occupied and used under purchase or otherwise by the United States for a fort, or arsenal, or other constitutional purpose, the state jurisdiction remains complete and perfect. This rule was held in the case of *The People* v. *Godfrey*,(*a*) and in the case cited from Pennsylvania.(*b*) In the case of Godfrey, the court held that it had jurisdiction of a murder committed by one soldier upon another within Niagara fort.

§ 225. A question has been made as to what was the effect of the proviso or reservation usually annexed to the consent of the state, that all civil and criminal process, issued under the authority of the state, might be executed on the lands so ceded in like manner as if the cession had not been made. This question, it will be perceived, was collaterally considered in the case above cited from Massachusetts.(*c*) It also came under consideration in the case of *The United States* v. *Cornell*.(*d*) In that case it was contended, that the state retained a concurrent jurisdiction over the place. The court under this point proceeded to consider the true intent and effect of such a proviso. It held, that in its terms it did not contain any reservation of concurrent jurisdiction or legislation. That it provided only that civil and criminal process, issued under the authority of the state, which must of course be for acts done within and cognizable by the state, might be executed within the ceded lands, notwithstanding the cession: that not a word was said from which it could be inferred that it was intended that

(*a*) 17 J. R. 225.
(*b*) 1 Hall's Jour. 53.
(*c*) 8 Mass. R. 72.
(*d*) 2 Mason's R. 65.

the states should have a right to punish for acts done within the ceded lands: that the whole apparent object was answered by considering the clause as meant to prevent these lands from becoming a sanctuary for fugitives from justice, for acts done within the acknowledged jurisdiction of the state: that there was nothing incompatible in this with the exclusive sovereignty or jurisdiction of one state, that it should permit another state in such cases to execute its processes within its limits: that a cession, or exclusive jurisdiction, might well be made with a reservation of a right of this nature, which operated only as a condition annexed to the cession, and as an agreement of a new sovereign to permit its free exercise as *quoad hoc*, his own process: that this was the light in which it had been viewed in the case of Clary,(*a*) and that in the judgment of the court, that view of the clause comported entirely with the apparent intention of the parties, and gave effect to acts which might otherwise be construed as entirely nugatory: that it might be well doubted whether congress was by the terms of the constitution at liberty to purchase lands for forts, &c., with the consent of the state legislature where such consent was so qualified, that it would not justify the *exclusive legislation* of congress there: that it had not the least doubt that the true interpretation of the proviso left the sole and exclusive jurisdiction of the lands thus ceded in the United States.

§ 226. Chancellor Kent says, congress, in exercising powers of exclusive legislation over a ceded place or district, unite the powers of general with those of local legislation. The power of local legislation comes with it, as an incident to the right, to make that power effectual. Congress exercises that particular local power, like all

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(*a*) 8 Mass. R. 72.

its other powers, in its high character as the legislature of the Union, and its general power may come in aid of these local powers. It is therefore competent for congress to try and punish an offender for an offence committed within one of these local districts, in a place not within such jurisdiction, and to provide for the pursuit and arrest of a criminal escaping from one of those districts after committing a felony there, or to punish a person for concealing out of the district a felony committed within it.(*a*)

§ 227. The next power granted to congress is, "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." In the case of *McCulloch* v. *The State of Maryland*,(*b*) it was decided, that under this clause of the constitution congress had power to incorporate a bank. That the power of establishing a corporation was not a distinct sovereign power or end of the government, but only the means of carrying into effect other powers which are sovereign. Whenever it becomes an appropriate means of exercising any of the powers given by the constitution to the government of the Union, it may be exercised by that government. That, if a certain means to carry into effect any of the powers expressly given by the constitution to the government of the Union, be an appropriate measure, not prohibited by the constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognizance. In the case of *The United States* v. *Fiske*,(*c*) it was held, that the power of congress to give the priority to debts

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(*a*) 1 Kent's Com. 430.
(*b*) 4 Wheat. 316.
(*c*) 2 Cranch, 358.

due to the United States, is claimed under the authority to make all laws which shall be necessary and proper to carry into execution the powers vested by the constitution in the government of the United States or in any department thereof. "Congress must possess the choice of means and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution. It is under the same implied authority, that the United States have any right even to sue in their own courts; for an express power is no where given in the constitution, though it is clearly implied in that part respecting the judicial power. And congress may not only authorize suits to be brought in the name of the United States, but in the name of any artificial person (such as the post-master general) or natural person for their benefit. Indeed, all the usual benefits appertaining to a *personal* sovereign in relation to contracts, and suing and enforcing rights, so far as they are within the scope of the powers of the government, belong to the United States, as they do to other sovereignties. The right of making contracts and instituting suits is an incident to the general rights of sovereignty; and the United States being a body politic, may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law, and appropriate to the just exercise of those powers, and enforce the observance of them by suits and judicial process."

§ 228. We have thus far considered the clauses of the federal constitution containing express grants of powers to congress, and the judicial decisions under them, and incidentally the limitations upon the state sovereignties arising out of those grants. We are in the next place to consider the restrictions laid upon the legislative power of the Union, under express prohibitions found in

the same instrument. It is provided that "the immigration or importation of such persons as any of the states shall think proper to admit shall not be prohibited by the congress, prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person." This limitation of the powers of congress has now expired by its own limitation, hence no question will be likely to arise under it.

§ 229. "The writ of *habeas corpus* shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it." This clause was introduced into the constitution as one essential to personal liberty of the citizen. The necessity and importance of such a writ has been clearly and beautifully expressed by the learned commentator on English law, who says: "to bereave a man of life, or by violence to confiscate his estate without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the kingdom. But confinement of the person by secretly hurrying him to the jail, where his sufferings are unknown and forgotten is a less public, a less striking, and therefore a more dangerous engine of arbitrary force. The writ which it was the design of this clause to secure is that known to the common law as the writ of *habeas corpus ad subjiciendum*, which is directed to one detaining another, commanding the production of the person detained, and the cause of such caption and detention, *ad faciendum, subjiciendum, et recipiendum*, to do, submit, and receive whatever the court or officer awarding such writ should consider in that behalf.

§ 230. "No bill of attainder, or *ex post facto* law shall be passed." The first question which arises under this clause is, what is to be considered as a bill of attainder within the meaning of this clause. A bill of attain-

der, as understood in England, is a special act of parliament which inflicts capital punishment upon persons supposed to be guilty of high crimes, and that without any conviction by the ordinary judicial tribunals. Woodeson says "such acts of the supreme power are with us called bills of attainder which are capital sentences, and bills of pains and penalties which inflict a milder degree of punishment. In these instances the legislature assume judicial magistracy, weighing the enormity of the charge and the proof in support of it, and then deciding the political necessity and moral fitness of the penal judgment."(*a*) Thus it will be perceived, that in England a distinction was made between bills of attainder and bills called bills of pains and penalties. The former inflicting capital punishment, the other a milder one than death. But the word as used in this clause of the constitution has been held to include not only a bill of attainder as understood in England, but also all bills which there, would be regarded as bills of pains and penalties. In *Fletcher* v. *Peck*,(*b*) the court say: "A bill of attainder may affect the life of an individual or may confiscate his property, or may do both. In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained.

§ 231. The second question which arises for consideration under this clause is, what is an "*ex post facto*" law, within the meaning of the constitution? The meaning to be given to this in a literal sense would be, a law passed after the act is done. In a comprehensive sense, the term "*ex post facto law*," embraces all retrospective laws, or laws governing or controlling past transactions, whether they are of a civil or criminal nature. Laws, however, which mitigate the character or punishment of a crime already committed may not

(*a*) 2 Woodd. l. 41, p. 371. (*b*) 6 Cranch, 138.

fall within the prohibition contained in this clause, for they are in favor of the citizen. *Ex post facto* laws relate only to penal and criminal proceedings, which impose punishments or forfeitures, and not to civil proceedings, which affect private rights retrospectively. In the case of *Fletcher* v. *Peck*,(*a*) Chief Justice Marshall, in delivering the opinion of the court, says; "An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed." In the case of *Calder* v. *Bull*,(*b*) Chase, Justice, in delivering the opinion, defines *ex post facto* laws to be, 1st, Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes the action. 2. Every law that aggravates a crime, or makes it greater than it was when committed. 3. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed. 4. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender.

§ 232. It is true, Mr. Justice Johnson, in a note to 2 Peters, 681, in the exposition of this phrase in the constitution, in reviewing this case, attempts to show that *ex post facto* laws include not only those which relate to criminal or penal statutes, but also to statutes affecting civil rights, he says: "The case of a legislature declaring a void deed to be a valid deed, is a striking one to show, both that the prohibition to pass laws violating the obligation of contracts is not a sufficient protection to private rights, and that the policy and reason of the prohibition to pass laws violating the obligation of contracts, is not a sufficient protection to private rights, and

(*a*) 6 Cranch, 87; 2 Peter's Con. Rep. 308.
(*b*) 3 Dallas, 386.

that the policy and reason of the prohibition to pass an *ex post facto* law, does extend to civil as well as criminal cases, the restriction not to pass *ex post facto* laws could not be limited to *criminal statutes* without restricting the protection of the constitution to bounds, that would import a positive absurdity." "Many statutes have a retrospective operation, which cannot be supposed to be included in this constitutional prohibition. Of this description are all acts legalizing past proceedings; all acts of relief, or pardon, or indemnity; all acts which mitigate the malignity of an offence, or mollify the rigor of the criminal law, and many others which might be enumerated. These are all retrospective, but are not in the constitutional sense *ex post facto*. The words, "*ex post facto*," have a definite, technical signification. The plain and obvious meaning of this prohibition is, that the legislature shall not pass any law, after a fact done by any citizen, which shall have relation to that fact, so as to punish that which was innocent when done, or to add to the punishment of that which was criminal, or to increase the malignity of a crime, or to retrench the rules of evidence, so as to make conviction more easy. This definition of an *ex post facto* law is sanctioned by long usage. The words had acquired an established, definite, technical signification, long before British jurisprudence was known, or the English language spoken in America. In this sense the words have been used and understood by the most celebrated statesmen and jurists, both here and in England."

§ 233. His view, however, as regards civil rights, is overruled by the whole current of decisions on this subject. Judge Chase in the case above cited, says:—"If the prohibition against making '*ex post facto*' laws was intended to secure personal rights from being affected or injured by such laws, and the prohibition is sufficiently extensive for that ob-

ject, the other restraints enumerated were *unnecessary*, and therefore improper, for both are retrospective." Judge Iredell also says: "The policy, the reason and humanity of the prohibition does not extend to civil cases, to cases that merely affect the private property of citizens." The courts of New York have held that the term *ex post facto* law, in this clause of the constitution, applies only to criminal cases.(*a*) The same doctrine seems to have been recognized in the case of *Clark* v. *Clark*.(*b*) Speaking of a law relating to divorce, the court say: "If the proceedings for a divorce were to be regarded as part of a *criminal code*, and the divorce itself a punishment, a retrospective law for that purpose would be an *ex post facto law*, and thus clearly void." In the case of *Strong* v. *The State*,(*c*) it was held, that the term "*ex post facto law*," literally means any law which relates to and operates upon a fact which existed prior to its enactment. This sense of the words is too large and indefinite to be received as the sense in which they were used and understood by the framers of our constitution. That the objection of *ex post facto* law, applies only to laws respecting crimes, has been repeatedly held in Massachusetts.(*d*) In one case, Chief Justice Parker speaking of such laws says: "It is contrary to the fundamental principles of a free government, that a law should operate retrospectively, so as to make an act criminal which, at the time when it was done, was innocent; and if the legislature should pass such a law, the court might, perhaps, decide that it was passed by mistake, even if we had no constitution prohibiting the enactment of *ex post facto* laws. But there is a clause in the constitution of the United States which is of paramount

(*a*) *Dash* v. *Van Kleek*, 7 J. R. 177.
(*b*) 10 N. H. 380.
(*c*) 1 Blackf. 193.
(*d*) *Lock* v. *Dane*, 9 Mass. R. 362.

authority to prevent any state from passing such laws, so that without resorting to fundamental principles, it would be the duty of the court to say that the statute in question, if it is *ex post facto*, is not law." The general nature of *ex post facto* laws is to make acts criminal which, at the time when they were done, were innocent, and which had not been made an offence by any previous law.(*a*)

§ 234. It is unnecessary to multiply authorities upon this point, as we apprehend that the authorities cited fully establish the position that *ex post facto* laws are to be considered only such as relate to criminal proceedings. Indeed, Mr. Justice Johnson cites no authority in this country directly decisive of a different view of this rule, but seeks mainly to show that the cases relied upon in support of a different rule have not necessarily determined this question, and that the phrase "*ex post facto*," is not confined in its ordinary signification to criminal law or criminal statutes, admits of positive demonstration. His argument of this question is certainly one of great force, and logical, well worthy perusal and consideration. We are not aware, however, that it has ever been judicially adopted in such a manner as to make it authoritative, so as to change the construction already adverted to. There are numerous cases in the books where the distinction between retrospective and *ex post facto* laws are clearly recognized. We shall, in this connection, advert to several decisions of courts which have held certain laws of state legislatures not to be *ex post facto* laws, within the meaning of the constitution prohibiting such laws.

§ 235. It has been held, that the legislature may pass laws altering, modifying, or taking away remedies for the recovery of debts, without incurring a violation of

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(*a*) *Ross' Case*, 2 Pick. 169.

the provision of the constitution which forbids the passage of *ex post facto* laws.(*a*) In *Strong* v. *The State*,(*b*) it was held, that under the statute of Indiana which changed the punishment for perjury from whipping to confinement in the penitentiary, a person guilty of perjury when the former punishment was inflicted might be convicted after the statute took effect, and be punished by the latter punishment; and that the statute making the change in the nature of the punishment was not *ex post facto*, according to the meaning of the words in the constitution. The court in that case say: "Can a man be sentenced to a punishment different from that which existed at the time the offence was committed? It is insisted he cannot. And why cannot this be done? The legislature has power to enact laws prescribing when and where, and in what manner crimes shall be punished. The legislature has made the statute under consideration. It has said that it shall take effect from a certain time; and that from and after that time, all persons convicted of crimes which, under the then existing laws, would subject them to the punishment of stripes, shall, in lieu of stripes, be confined in the state prison. The business of a judicial tribunal is not to make or alter the law, but to declare what the law is; and we cannot justify ourselves in saying, that the circuit court has committed an error in deciding agreeably to legislative authority, unless it is evident beyond all doubt, that the legislature has transcended its constitutional powers. To the constitution alone we are to look for a limit to legislative authority. The parliament of Great Britain, whence we have derived our first ideas of legislative as well as of judicial authority, has claimed

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(*a*) *Evans* v. *Montgomery*, 4 Watts & Serg. 218.

(*b*) 1 Blackf. 193.

and in many instances has exercised the power of enacting laws calculated to entrap the subject, and expose him to capital or other punishment for actions which, at the time of their performance, were perfectly innocent, or to inflict greater punishments for acts already criminal, than were by law annexed to such offences at the time they were committed. By the enactment of such statutes, the most faithful subjects of that kingdom have been sacrificed, and in times of internal commotion and political persecution, the blood of innocent victims has been made to smoke on the altar, as an oblation to the malignant passions of men in power. The framers of our constitution knowing these facts, wisely provided a limit to legislative power. In the 18th section of the first article of the constitution it is provided that no "*ex post facto* law shall be made." If the statute under consideration is not prohibited by this clause of our constitution, it is nowhere prohibited in that instrument. Many statutes have a retrospective operation, which cannot be supposed to be included in this constitutional prohibition. Of this description are all acts legalizing past proceedings; all acts of relief, of pardon or indemnity; all acts which mitigate the malignity of an offence, or mollify the rigor of the criminal law, and many others which might be enumerated. These are all retrospective, but are not in the constitutional sense, "*ex post facto*." It held that the statute was not *ex post facto*, for the reasons that it did not create a new offence, did not increase the malignity of that which before was an offence, did not change the rules of evidence, so as to render conviction more easy, did not increase the punishment of that which was criminal before its enactment.

§ 236. In the case of *Ross*,(*a*) it was held, that if a statute add a new punishment, or increase an old one,

(*a*) 2 Pick. 169

for an offence committed before its passage, such an act would be *ex post facto*. That a party ought to know at the time of committing the offence the whole extent of the punishment, for it might sometimes be a matter of calculation, whether he will commit the offence in view of the severity of the punishment. In this case it was held, "The provision in the act of 1817, c. 176, § 5, that where a person has been convicted of a crime punishable by confinement to hard labor, he shall upon conviction of another offence punishable in like manner, be sentenced to a punishment in addition to the one prescribed by law for this last offence, was not *ex post facto*, when applied to a case in which the second offence was committed, after the passing of the statute. It might be otherwise, however, if applied where the second offence was committed before the statute was passed. The court say, "if this is an additional punishment to an offence committed after the passing of the statute, to be inflicted by the court upon coming to the knowledge of certain facts, the statute is not *ex post facto*. As if a law was made, that a person under a certain age committing a crime should receive a mild punishment, and that a person over that age, committing a crime, should be punished severely; and further, that if it should be found, after the mild punishment had been awarded, that the culprit was over the age prescribed, the severe punishment should be inflicted, this would not be *ex post facto*, because the extent of punishment was declared before the offence was committed. The statute might perhaps have been intended to operate on criminals already in prison, and some informations were accordingly filed in cases of that sort. But this objection was made, and two judges, at *nisi prius*, were of opinion that the statute could not be construed to apply to such cases. On recurring to St. 1804, c. 143, § 3, it will be found to contain a provision similar in effect to the statute in ques-

tion; and its being acquiesced in for twenty years furnishes strong evidence of its being correct in principle. The statute alluded to provides, that if any person having been before convicted of larceny, shall afterwards commit another larceny, he shall be punished more severely than if he had not previously committed the like offence. The punishment is enhanced from the character of the culprit. So the same statute provides, that if the same person shall be convicted at the same term of three distinct offences, he shall receive a more severe punishment. The same objection would apply in these cases, as much as in the one under consideration; that the culprit was punished because he committed prior offences, and that he was punished anew for those offences. But in our view the punishment is for the last offence committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself." It has also been held, that a statute creating a new court, or conferring a new jurisdiction, or enlarging or diminishing the powers of an existing court, is not an *ex post facto* law.(*a*) These decisions proceed upon the ground that such courts have no vested constitutional rights which cannot be limited or defined by the legislative power. That hence the legislature has the right to mould the jurisdiction of all courts at its will, provided it does not invade the sanctuary of any other constitutional provision; hence may enlarge or diminish the power and duty of courts and magistrates. That all this authority, if not expressly given, would necessarily result from the very nature of the legislative power. All public officers impliedly consent to alterations in the institutions in which they offi-

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(*a*) *Wales* v. *Belcher*, 3 Pick. 508. *Commonwealth* v. *Philips*, 11 Pick. 28.

ciate, provided the public deem it expedient to introduce a change.(*a*)

§ 237. The next restriction upon the power of congress is, "No capitation or other direct tax shall be laid unless in proportion to the census or enumeration herein before directed to be taken." The questions arising under this clause have already been considered, as well as those arising under the next, which is as follows: "No tax or duty shall be laid on articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the ports of one state over another, nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another."

§ 238. The remaining clause in this article of the constitution has not, as we are aware, ever received any judicial construction; it is as follows: "No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

§ 239. The next restriction upon the power of congress is as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

§ 240. There are also certain constitutional restrictions upon the powers of congress arising by implication, owing to the repugnance of particular acts to other clauses in the constitution. It has been held, that congress cannot vest any portion of the judicial powers of the United States, except in courts ordained and established by itself; and that no part of the criminal juris-

(*a*) *Merril* v. *Sherburn*, 1 N. H. 213.

diction of the United States can, consistently with the constitution, be delegated to the state tribunals. The reason for this decision seems to be, that the state courts were *not ordained or established by congress*, and were not amenable to that body. That the judiciary of a state is a constituent part of another and independent sovereignty, from which they receive their authority and support, whose laws they are bound to execute. But they are under no such obligation to the *United States*, whose laws they are bound to obey as citizens, but not to execute as magistrates.(*a*) And that the constitution declares that, "the judicial power of the United States shall be vested in one supreme court and in such inferior courts as congress may, from time to time, *ordain* or *establish*.

§ 241. We have thus far confined ourselves to the question of the powers of congress, and the limitations on those powers contained in the federal constitution. In the next place we shall proceed to consider the restrictions laid upon the legislatures of the respective states under the federal constitution. It will be borne in mind, in the outset, that under the tenth article of the amendments to the constitution it is expressly provided, that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively," or to the people. By the 10th section of article 1, of the constitution it is expressly declared, "No state shall enter into any treaty, alliance or confederation, grant letters of marque and reprisal, coin money, emit bills of credit, make any thing but gold and silver coin a tender in payment of debts, pass any attainder or *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility." Thus far the

(*a*) *Ely* v. *Peck*, 7 Day R. 213. *Martin* v. *Hunter's Lessees*, 1 Wheat. R. 304, 330.

prohibition upon the states is absolute and unqualified.

§ 242. We have already considered, incidentally, under the head of the powers of congress, the decisions as it regards the coining of money and the passing of bills of attainder and *ex post facto* laws, and the nature of those laws, which is all that is necessary to be said in regard to those restrictions. There has not, as we are aware, been any judicial construction in regard to that part of this section which relates to treaties, alliances or confederations, or letters of marque, reprisals, &c. A treaty is, in its nature, a contract between two nations, and not a legislative act, strictly speaking; yet it does not generally effect itself, the object to be accomplished, especially so far as its object is infra territorial, but is carried into effect by the sovereign power of the parties to the instrument, where either of the parties engage to perform a particular act, the treaty addresses itself to the political power of the state, and it must be executed through the legislative department of the government.

§ 243. The only class of restrictions contained in this section to which it is necessary to advert under this head, are those which relate to emitting bills of credit, making any thing but gold and silver coin a tender in payment of debts, and acts impairing the obligation of contracts. 1st, what are bills of credit, within the meaning of this clause of the constitution? In its enlarged and perhaps liberal sense, the term "bills of credit," may comprehend any instrument by which a state engages to pay money at a future day; thus including a certificate given for money borrowed. But the language of the constitution itself, and the mischief to be prevented, equally limit the interpretation of the term. The word "emit," is never employed in describing those contracts by which a state binds itself to pay money at a future

day, for services actually received, or for money borrowed for present use. Nor are instruments executed for such purposes, in common language, denominated "bills of credit." "To emit bills of credit," conveys to the mind the idea of issuing paper intended to circulate through the community, for its ordinary purposes, as money; which paper is redeemable at a future day. This is the sense in which the terms have always been understood.(*a*) The term, "bills of credit," in its mercantile sense, comprehend a great variety of evidences of debt, which circulate in a commercial community. In the early history of banks, it seems their notes were generally denominated "bills of credit;" but in modern times they have lost that designation, and are either called "bank bills," or "bank notes." But the inhibition of the constitution applies to bills of credit, in a limited sense.(*b*) The definition of a bill of credit, which includes all classes of bills of credit emitted by the colonies or states, is a paper issued by the sovereign power, containing a pledge of its faith, and designing to circulate as money.(*c*)

§ 244. To constitute a bill of credit within the constitution, it must be issued by a state, on the faith of a state, and designed to circulate as money. It must be a paper which circulates on the credit of the state, and so received and used in the ordinary business of life. The individuals or committees who issue it must have power to bind the state; they must act as agents, and, of course, not incur any personal responsibility, nor impart as individuals, any credit to the paper. These are the leading characteristics of a bill of credit, which a state cannot

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(*a*) *Craig et al.* v. *The State of Missouri*, 4 Peters, 431.

(*b*) *Briscoe* v. *The Bank of the Commonwealth of Kentucky*, 11 Peters, 258.

(*c*) Ibid.

emit.(*a*) The constitution considers the emission of bills of credit, and the enactment of tender laws, as distinct operations, independent of each other, which may be separately performed. Both are forbidden. To sustain the one because it is not also the other; to say that bills of credit may be emitted, if they be not made a tender in payment of debts; would be, in effect, to expunge that distinct, independent prohibition, and to read the clause as if it had been entirely omitted.(*b*)

§ 245. On the 27th day of June, 1821, the legislature of the state of Missouri passed an act entitled "an act for the establishment of loan offices;" by the third section of which, the officers of the treasury of the state, under the direction of the governor, were required to issue certificates to the amount of two hundred thousand dollars, of denomination not exceeding ten dollars, nor less than fifty cents, in the following form: "This certificate shall be receivable at the treasury of any of the loan offices in the state of Missouri, in discharge of taxes or debts due to the state, for the sum of dollars, with interest for the same, at the rate of two per cent per annum, from this date." These certificates were to be receivable at the treasury and by tax gatherers and other public officers, in payment of taxes, or moneys due or to become due to the state, or to any town or county therein, and by all officers, civil and military, in the state, in discharge of salaries and fees of office; and in payment for all salt made at the salt springs owned by the state, and to be afterwards leased by the authority of the legislature. The twenty-third section of the act pledged certain property of the state for the redemption of those certificates; and the

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(*a*) *Briscoe* v. *The Bank of the Commonwealth of Kentucky*, 11 Peters, 258.

(*b*) *Craig* v. *The State of Missouri*, 4 Peters, 431.

law authorized the governor to negotiate a loan of silver or gold for the same purpose. A provision was made in the law, for the gradual withdrawal of the certificates from circulation; and all the certificates have since been redeemed. The commissioners of the loan office were authorized to make loans of the certificates to citizens of the state, assigning to each district a proportion of the amount of the certificates, to be secured by mortgage or personal security; the loans to bear interest not exceeding six per cent per annum, and the loans on personal property to be for less than two hundred dollars. It was held, that the certificates issued under the authority of the law of Missouri, were "bills of credit," and that their emission was prohibited by the constitution of the United States, which declares that no state shall emit "bills of credit."(*a*) A state cannot emit bills of credit, or, in other words, it cannot issue that description of paper, to answer the purpose of currency, which was denominated, before the adoption of the constitution, "bills of credit." But a state may grant acts of incorporation for the attainment of those objects which are essential to the interests of the society. This power is incident to sovereignty, and there is no limitation on its exercise by the state in the constitution, in respect to the incorporation of banks.(*b*) When a state emits bills of credit, the amount to be issued is fixed by law, as also the fund out of which they are to be paid, if any fund be pledged for their redemption, and they are issued on the credit of the state; which, in some form, appears on the face of the notes, or by the signature of the person who issues them.(*c*)

(*a*) *Craig* v. *The State of Missouri*, 4 Peters, 431. See also *Linn* v. *State Bank of Illinois*, 1 Scam. 87.

(*b*) *Briscoe, &c.* v. *The Bank of Kentucky*, 11 Peters, 258.

(*c*) Ibid.

§ 246. It has been held that a bank note issued by the bank, the act of the incorporation of which declared that it should be established in the name of the commonwealth of Kentucky, under the direction of president and directors chosen by the legislature, and declared to be exclusively the property of the state, authorizing the issuing of notes, with a capital of $2,000,000, to be paid out of money thereafter to be paid into the treasury of the state for vacant lands, were not bills of credit within this clause of the constitution, notwithstanding the dividends of the bank were to be paid into the treasury. The decision in this case was placed upon the ground that there was with others, one quality which distinguished the notes of this bank from bills of credit. That every holder could look to the bank as well as to its funds, and had in his power the means of enforcing his claim against the corporation. That as at the time of the adoption of the constitution, the Bank of North America and the Massachusetts Bank, and some others, were in operation, it could not be supposed that the notes of those banks were intended to be inhibited by the constitution, or that they were considered as bills of credit within the meaning of that instrument. That upon a fair construction of the terms "*bills of credit*," as used in the constitution, they did not include ordinary bank notes.(*a*)

§ 247. The clause in the constitution prohibiting the making any thing but gold and silver coin a tender in payment of debts, is founded upon the same general policy and upon the same general considerations as those relating to bills of credit, and the coining of money. It has been held, that this prohibition applies to all future laws on the subject of tender, and consequently, that no

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(*a*) *Briscoe* v. *The Bank of the Commonwealth of Kentucky*, 11 Peters, 259.

state legislature can provide, that future pecuniary contracts may be discharged by any thing but gold and silver coin.(*a*)

§ 248. We are in the next place to consider what laws are within the prohibition against impairing the obligation of a contract. It should be remarked, in the first place, that the objection to a law on the ground of its impairing the obligation of a contract, does not depend on the extent of the change which the law may make in it: that any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, or imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation, and is within this constitutional prohibition.

§ 249. The language in this clause is general, and applies to all contracts which respect property or some object of value, and confer rights which may be asserted in a court of justice. When the constitution was framed the term "*contract*" had a known legal meaning, as definite and as well understood as a bill of attainder or an *ex post facto* law. This meaning was adopted, and became a part of the instrument as fully as if it had been expressed in words. The common law had defined the term. It had declared a contract to be a compact between two or more parties; and whether it related to real or personal estate, or was executed or executory, or rested in parol or was under seal, the constitution preserved it inviolate from the action of a state legislature, so far as it created rights or contained obligations binding on the parties in law or equity. The character of the parties to the compact, was not intended to prevent the

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(*a*) *Ogden* v. *Saunders*, 12 Wheat. 265–339. Story on the Constitution, § 1366.

general application of the prohibition. Whether a state, a minor municipal corporation, or an individual is a party, is immaterial. All are embraced in the same provision. The rights and duties of the contracting parties, whoever they may be, are determined by the contract, and are protected from legislative interference and control.

§ 250. The constitution does not, however, give validity to contracts which confer no right; nor does it add to those which they do confer. It prohibits a state from impairing the *obligation* of the contract, that is, the rights and duties which arise from it. It does not declare that every contract contained an obligation, or that it should be enforced; but it does declare, that whatever obligations are created or rights secured, shall not be impaired by the act of the legislature; thus leaving the questions as to the nature, form, extent, construction, and validity of the contract, and the manner of enforcing it, to be determined by the judicial department of the government, and only prohibiting the legislature from passing a law which shall impair the obligations or rights created by it.

§ 251. It is obvious, therefore, that in every case where the prohibition is attempted to be applied, the first inquiry is, whether the case be one in which the subject matter is a contract relating to property or some object of value, and which imposes an obligation capable, in legal contemplation, of being impaired? If it be such a contract, the remaining inquiry is, whether the act of the legislature impairs that obligation? Hence, it is a proper subject of examination whether the contract be executed, or executory? And if the latter, whether it be upon sufficient consideration, proved or presumed? If it be an act of the legislature which constitutes the contract, is it executed? Has the object of the contract been performed? or, is it a mere executory contract, re-

quiring the further action of the legislature or its agents, to complete its execution? And if the latter, is it voluntary, or upon sufficient consideration? If the contract be one which the legislature has the constitutional power to make, and it be executed, and no further act remains to be done, by the state or its agents—as if a grant of money be made, and the money be delivered, or of land, and the legislative act is itself the conveyance, not requiring the execution and delivery of a deed or other instrument, nor any other act to be done to complete it—the contract has passed to the form of a grant; it has become a contract executed, and the law in which it originates, cannot be repealed. But if the contract be executory, as if it be a gift of money or land unexecuted, requiring some further act to its completion, as the delivery of the money, or the execution of an instrument of conveyance, and is without consideration in fact or presumed, then before its completion, and the existence of any consideration, it may be repudiated: the gift may be withheld, and the party who made the promise may revoke it. In this respect, the state and an individual are subject to the same rule. It is essential to the validity of a gift, that there be a delivery of the thing given, or that which is equivalent to it. *Donatio perficitur, possessione accipientis.* A mere promise to give, is no gift; and such a promise is equally nugatory, whether made by a state or individual.

§ 252. The true meaning of this clause of the constitution may be stated as follows: The body upon which the prohibition rests, is the legislative department of the state. The subject of the prohibition is every contract relating to property or some object of value, and which confers rights which may be asserted in a court of justice. It is immaterial whether the contract be one between a state and an individual, or between individuals only; the contracting parties, whoever they may be,

stand, in this respect, upon the same ground. The obligations imposed, and the rights acquired by virtue of the contract, cannot be impaired by a legislative act. A law which discharges these obligations, or abrogates these rights, impairs them. A constitutional act of legislation, which is equivalent to a contract, and is perfected, requiring nothing further to be done in order to its entire completion and perfection, is a contract *executed;* and whatever rights are thereby created, a subsequent legislature cannot impair. The obligation created by a constitutional law, which is in the nature of an executory contract, and is supported by a sufficient consideration, cannot be annulled at the pleasure of the legislature. A statute enacted by a legislative body, having authority under the constitution to enact it, which implies a contract executory, depending upon the further action of the legislature or its agents for its execution, and which is without any consideration in fact or law, may, before its execution and the existence of any consideration, be repealed, such a contract not creating any rights or duties which, in legal contemplation, can be impaired. Such it has been held, was the true meaning of this clause of the constitution; and such is the interpretation which has been given it in the cases where it has been under the consideration of courts of justice.(*a*)

§ 253. It has also been settled, that a contract entered into between a state and an individual, or between a state and a corporation, is as fully protected by this pro-

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(*a*) *Trustees of the Bishop's Fund* v. *Rider*, 13 Day's R. 87. See also, *Fletcher* v. *Peck*, 6 Cranch, 87; *New Jersey* v. *Wilson*, 7 Cranch, 164; *Terrett* v. *Taylor*, 9 id. 43; *Sturgess* v. *Crowningshield*, 4 Wheat. R. 122; *Dartmouth College* v. *Woodward*, 4 Wheat. R. 518; *Green* v. *Biddle*, 8 Wheat. R. 1; *Atwater* v. *Woodbridge*, 6 Conn. R. 223; *Osborne* v. *Humphrey*, 7 Conn. R. 336; *The Derby Turnpike Co.* v. *Parks*, 10 Conn. R. 522; *Landon* v. *Litchfield*, 11 id. 251; *The People* v. *Platt*, 17 Johns. R. 195.

hibition, as a contract between two individuals: and also to contracts executed or executory, between private individuals, or a state and individuals or corporations, or between two states.(*a*) This prohibition does not, however, extend to paper money, or tender laws, for the reason that those subjects are expressly provided for; nor is it to be limited to instalment and suspension laws, because the terms of the prohibition are general and comprehensive, and establish the principle of the inviolability of contracts in every mode.(*b*) A law in force when the contract is made cannot be said to be one which impairs its obligation, and that for the reason that existing laws are to be regarded as entering into and forming part of every contract or stipulation between the parties.(*c*) It is upon this principle that the supreme court of the United States in the case of *Ogden* v. *Saunders*,(*d*) held, that a bankrupt or insolvent law of any state, which discharged both the person of the debtor and his future acquisitions of property, was not "a law impairing the obligation of contracts," so far as respects debts contracted subsequent to the passage of such law, in those cases where the contract was made between citizens of the state under whose laws the discharge was obtained, and in whose courts the discharge might be pleaded. But a law made after the existence of a contract which alters the terms of it, by rendering it less beneficial to the creditor, or by defeating any of the terms upon which the parties had agreed, impairs its obligation within the meaning of this clause of the con-

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(*a*) *Providence Bank* v. *Billings et al.*, 4 Pet. 514; *Dartmouth College* v. *Woodward*, 4 Wheat. R. 518.

(*b*) *Sturgess* v. *Crowningshield*, 4 Wheat. 122.

(*c*) *Blanchard* v. *Russell*, 13 Mass. R. 116; *Bronson* v. *Kensie*, 1 How. R. 315.

(*d*) 12 Wheat. 213.

stitution.(*a*) Upon these principles it has been held, that a bankrupt law made to affect contracts which existed previous to the passage of the law, directly impairs the obligation of such contract.(*b*) And it was upon this principle that the supreme court of the United States held the act of the legislature of the state of New York, passed on the 3d of April, 1811, (which not only liberated the person of the debtor, but discharged him from all liability for any debt contracted previous to his discharge, on his surrendering his property in the manner it prescribed,) so far as it attempted to discharge the contract, was a law impairing the obligations of contracts, within the meaning of the constitution of the United States.(*c*) And upon the same principle it has been held, that such a law may be constitutionally passed when it only provides for the discharge of the debtor from liability for debts contracted subsequent to the passage of the law.(*d*)

§ 254. A state may, however, regulate at pleasure the modes of proceeding in its courts in relation to past contracts, as well as future. It may shorten the period of time in which claims shall be bound by statutes of limitation. It may direct that the necessary implements of agriculture, or tools of a mechanic, or articles of necessity in household furniture, or wearing apparel, shall not be liable to execution on judgment. These have always been properly considered as belonging to the remedy, to be exercised or not by every sovereignty, according to its own views of policy and humanity. This right must

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(*a*) *Blanchard* v. *Russell*, 13 Mass. 1; *King* v. *Dedham Bank*, 15 Mass. 447; *Call* v. *Hagger*, 8 Mass. 423.

(*b*) *Blanchard* v. *Russell*, 13 Mass. R. 1; *Kimberly* v. *Ely*, 6 Pick. 440, 451; *Betts* v. *Bayley*, 12 Pick. 572.

(*c*) *Sturgess* v. *Crowningshield*, 4 Wheat. R. 122.

(*d*) *Walsh* v. *Fonard*, 13 Mass. R. 19; *Baker* v. *Wheaton*, 5 id. 509.

reside in every state to enable it to secure its citizens from unjust and harrassing litigation, and to protect them in those pursuits which are necessary to the existence and well being of every community. And, although a new remedy may be deemed less convenient than the old one, and may in some degree, render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy, may be altered according to the will of the state; provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy, or directly on the contract itself; in either case it is prohibited by the constitution.

§ 255. This subject came before the supreme court of the United States in the case of *Green* v. *Biddle*,(*a*) decided in 1823. It appears to have been twice elaborately argued by counsel on both sides, and deliberately considered by the court. On the part of the demandant in that case, it was insisted that the laws of Kentucky, passed in 1797 and 1812, concerning occupying claimants of land, impaired the obligation of the contract made with Virginia in 1789. On the other hand, it was contended that these laws only regulated the remedy, and did not operate on the right to the lands. In deciding the point the court say: "It is no answer that the acts of Kentucky now in question, are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interest of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests." And in the opinion delivered by the court after the second

(*a*) 8 Wheat. Rep. 1.

argument, the same rule is reiterated in language equally strong. Nothing, in short, can be more clear, upon the principles of law and reason, than that a law which denies to the owner of land a remedy to recover the possession of it when withheld by any person, however innocently he may have obtained it; or to recover the profits received from it by the occupant; or which clogs his recovery of such possession and profits, by conditions and restrictions tending to diminish the value and amount of the thing recovered, impairs his right to, and interest in, the property. If there be no remedy to recover the possession, the law necessarily presumes a want of right to it. If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist and be acknowledged, but it is impaired and rendered insecure, according to the nature and extent of such restrictions.(*a*)

§ 256. This question again came under consideration in the case of *Bronson* v. *Kinsie*.(*b*) In that case it was held, that a state law passed subsequently to the execution of a mortgage, which declared that the equitable estate of the mortgagor should not be extinguished for twelve months after a sale under a decree in chancery, and prevented any sale unless two thirds of the amount at which the property had been valued by appraisers should be bid therefor, was within this clause of the constitution, and therefore void. The court, in that case, after citing the cases above quoted from 8 Wheaton's Reports, say, "we concur entirely in the correctness of the rule above stated. It is difficult, perhaps, to draw a line that would be applicable in all cases between the legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the

(*a*) 8 Wheat. R. 75. (*b*) 1 Howard, 311.

obligation of the contract, and the right of a party under it, may, in effect, be destroyed by denying a remedy altogether, or may be seriously impaired by burthening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or encumbered it with conditions that rendered it useless or impracticable to pursue it."

§ 257. The decision in the case last cited by us was placed upon the ground, that according to the long settled rules of law and equity, the legal title to the mortgaged premises vested in the complainant on the forfeiture of the condition; and at law he had a right to sue for and recover the land itself. But, in equity, this legal title was regarded as a trust estate, to secure the payment of the money, and, therefore, when the debt was discharged, there was a resulting trust for the mortgagor.(*a*) It was upon this construction of the contract, that courts of equity lend their aid either to the mortgagor or mortgagee, in order to enforce their respective rights. The court would, upon the application of the mortgagor, direct the reconveyance of the property to him, upon the payment of the money; and, upon the application of the mortgagee, it will order a sale of the property to discharge the debt. But, as courts of equity follow the law, they acknowledge the legal title of the mortgagee, and never deprived him of his right at law until his debt was paid; and he was entitled to the aid of the court to extinguish the equitable title of the mortgagor, in order that he might obtain the benefit of his security. For

(*a*) *Conrad* v. *The Atlantic Insurance Co.*, 1 Peters, 441.

this purpose it was his absolute and undoubted right, under an ordinary mortgage deed, if the money was not paid at the appointed day, to go into the court of chancery, and obtain an order for the sale of the whole of the mortgaged property, (if the whole was necessary,) free and discharged from the equitable interest of the mortgagor; this was his right by the law of the contract, and it was the duty of the court to maintain and enforce it without any unreasonable delay. When this contract was made no statute had been passed by the state changing the rules of law or equity in relation to a contract of this kind. None such, at least, had been brought to the notice of the court; and it must, therefore, be governed, and the rights of the parties under it measured, by the rules above stated. They were the laws of Illinois at the time; and, therefore, entered into the contract, and formed a part of it, without any express stipulation to that effect in the deed. Thus, for example, there was no covenant in the instrument giving the mortgagor the right to redeem, by paying the money after the day limited in the deed, and before he was foreclosed by the decree of the court of chancery. But this was his right and remedy; for this right and this remedy by the law of the state then in force, was a part of the law of the contract, without any express agreement; and the rights of the mortgagee required no express stipulation to define or secure them. They were annexed to the contract at the time it was made, and formed a part of it; and any subsequent law impairing the rights thus acquired, impaired the obligations which the contract imposed. That the act of 19th February, 1841, under consideration, acted not merely on the remedy, but, indirectly, on the contract itself, and engrafted upon it new conditions injurious and unjust to the mortgagee. It declared, that although the mortgaged premises should be sold under the decree of the court of chancery, yet that the equitable

estate of the mortgagor should not be extinguished, but should continue for twelve months after the sale; and gave, moreover, a new estate which before had no existence, to judgment creditors, to continue for fifteen months. That if such rights might be added to the original contract by subsequent legislation it would be difficult to say at what point they should stop. That any such modification of a contract by subsequent legislation, against the consent of one of the parties, impaired its obligation, and was prohibited by the constitution.

§ 258. In a subsequent case,(*a*) it was held, by the same court, that a law of Illinois, providing that a sale should not be made of property levied on under an execution unless it would bring two-thirds of its valuation, according to the opinion of three householders, was within this clause of the constitution, and that such a law impaired the obligation of a contract. The court held, that the obligation of a contract consisted in its binding force on the party who made it. This depended on the laws in existence when made. Those laws were necessarily referred to in all contracts, and formed a part of them, as the measure of the obligation to perform them, by the one party, and the right acquired by the other. That there could be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicated, according to the settled legal meaning. That when it becomes consummated, the law defines the duty and the right, compelled one party to perform the thing contracted for, and gave to the other the right to enforce the performance by the remedies then in force. That if any subsequent law had the effect to diminish the duty, or to impair the right, it necessarily bore on the obligation of the contract, in favor of one

(*a*) *McCracken* v. *Hayward*, 2 Howard, 608.

party to the injury of the other, and hence that any law, which in its operation amounts to a denial or obstruction of the right accruing by a contract, though professing to act on the remedy, only impaired the obligation of the contract, and was within this clause of the constitution. That the obligation of the contract between the parties, in this case, was to perform the promises and obligations contained therein; the right of the plaintiff was to damages for the breach thereof, to bring suit and obtain a judgment, to take out and prosecute an execution against the defendant until the judgment was satisfied, pursuant to the existing laws of Illinois. These laws, giving these rights, were as perfectly binding on the defendant, and as much a part of the contract, as if they had been set forth in its stipulations in the very words of the law relating to judgments and executions. If the defendant had made such an agreement as to authorize a sale of his property, which should be levied on by the sheriff, for such price as should be bid for it at a fair public sale after reasonable notice, it would have conferred a right on the plaintiff which the constitution made inviolable; and it could make no difference whether such right is conferred by the terms or the law of the contract. Any subsequent law which denies, obstructs, or impairs this right, by superadding that there shall be no sale for any sum less than the value of the property levied on, to be ascertained by appraisement, or any other mode of valuation than a public sale, affected the obligation of the contract as much in the one case as in the other, for it could be enforced only by a sale of the defendant's property, and the prevention of such sale was a denial of the right. The same power in a state legislature might be carried to any extent, if it exists at all; it might prohibit a sale for less than the whole appraised value, or for three-fourths, or nine-tenths, as well as for two-thirds; for, if the power could be exercised to any extent, its exercise

must be a matter of uncontrollable discretion, in passing laws relating to the remedy which are regardless of the effect on the right of the plaintiff.

§ 259. In the case of *Nelson* v. *Allen and Harris*,(*a*) an act of the legislature of Tennessee, which gave to a defendant the value of his improvements made upon the land, in an action of ejectment or by suit for the same, was held to be in conflict with this clause of the constitution. The decision in this case as well as in the case of *Bristoe* v *Evans and M' Campbell*, decided previously in the same court, was put upon the ground, that the bill of rights had declared, "*that no law impairing the obligation of contracts shall be made.*" A grant from the state was a contract between the state and the grantee. It was a contract executed, and it contained binding obligations on the parties. Any legislative act which impaired the obligation arising from the grant, that the grantee should have the exclusive use and enjoyment of the property granted, subject to such taxes and burdens as had been customary, for the good of society, before the formation of the constitution was unconstitutional and void. The act in question could not bear the test of this principle. The idea that the state authorized a man to make an entry in the surveyor's books for the land of another, to make extensive improvements on the land, and under such circumstances, sustain an action for the value of the improvements, would be subversive of the clearest principles of natural right in relation to property, and consequently in violation of the constitution, which guarantied to every man the exclusive use of his own property. The same principle was applied in a case in the same court decided in 1813.(*b*) In that case the court said: "the idea of property, so dear to freemen, would be at once lost, if it can be controlled by others

(*a*) 1 Yerger, 360.

(*b*) *Townsend* v. *Ship's Heirs.*

without the owner's approbation. Therefore, at common law, a person who cleared or improved another's land, without his consent or request, was not only entitled to no compensation, but was liable to an action of trespass; though, it is believed, that on the principles governing a court of equity, that court would directly sustain an action for the value of improvements. At this day it would be time mis-spent to descant at length upon the principles of the constitution under which we live. Let it suffice to observe, that they secure to the honest and industrious the exclusive enjoyment of the fruits of that honesty and industry; and, in other words, the undisturbed use of their property. No man can be deprived of it but by his own consent, unless for the public use; and not then, without just compensation. These principles, being inseparably interwoven in the frame and texture of our constitution, cannot be destroyed by a legislative act." It was upon analogous principles that the supreme court of this state, in the case of *Quackenbush* v. *Danks*,(*a*) held, that the act of 1842, exempting certain property from distress for rent and sale on execution, did not affect executions for debts contracted before its passage. That if it extended to such debts it would be in conflict with this clause of the federal constitution. Under these cases it has at length become definitely settled, that a state law which impairs the obligations of a contract, whether that contract be found in the express terms and conditions of the written contract between the parties, or is engrafted upon the contract by the law of the land, as it existed at the time the contract was made, is within this prohibitory clause of the federal constitution, as well also as all laws aimed or nominally directed to the rem-

(*a*) 1 Denio, 128.

edy, when they so affect the remedy as to impair the right itself, or engraft upon such right, terms and conditions inconsistent with the original contract itself, and thus affecting or impairing its obligation. The principle has universally obtained, that no act of the legislature can alter the nature and legal effect of an existing contract, to the prejudice of either party. The difficulty that has arisen in all the cases upon this subject has been in defining and ascertaining the line of demarcation, between acts which affect the contract so as to impair its obligation, and acts relating to the subject matter of the contract, but affecting only the remedy.(*a*)

§ 260. There is another class of cases which have arisen in our courts, which have been upheld as not within this clause of the constitution, and which proceed upon the ground, that they effect the remedy *merely*, and leave the contract untouched and unimpaired. The remedy of imprisoning the debtor may be taken away, and has been so taken away; and such laws have been held as not impairing the obligation of the contract. This distinction was clearly recognized in the case of *Sturges* v. *Crowningshield*,(*b*) and it was upon this distinction that the supreme court of Massachusetts, in the case of *Bigelow* v. *Pritchard*,(*c*) held, that the insolvent law of 1838, which provided that an assignment should vest the debtor's property in the assignee, although the same might then be attached on mesne process, and should dissolve such attachment, applied to an attachment made after the statute went into operation, for the purpose of securing a debt incurred before its enactment, was not one impairing the obligation of the contract, but

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(*a*) See *King* v. *Dedham*, 15 Mass. R. 447. *Foster* v. *Essex Bank*, 16 Mass. R. 245.

(*b*) 4 Wheat. 122.

(*c*) 21 Pick. 169.

only affected the remedy. The court held, that the creditor had no vested right in the mere remedy, unless he had exercised it by the commencement of legal process under it, before the law making an alteration concerning it should have gone into operation, and that in that case the attachment had not been made until after the act was passed.

§ 261. This constitutional restriction also prohibits any state passing a law divesting a vested right, whether that right be acquired under or by virtue of an express contract, or acquired under or by virtue of a charter granted by the government itself, either to individuals or to a corporation, or held under a government charter antecedent to American independence. It was held, in the case of *The Trustees of Dartmouth College* v. *Woodward*,(*a*) that the charter granted by the British crown to the trustees of Dartmouth College in New Hampshire, in 1769, was a contract within the meaning of this clause of the constitution of the United States, and that the charter was not dissolved by the Revolution.

§ 262. In the case last cited the constitutionality of acts of the legislature of N. H., amending and altering the charter of Dartmouth College came in question. Among other alterations the act in question increased the number of trustees, and gave the appointment of additional members to the executive of the state, and created a board of overseers, with power to inspect and control the most important acts of the trustees. In this case, Chief Justice Marshall said: "It has been argued, that the word 'contract,' in its broadest sense, would comprehend the political relations between the government and its citizens, would extend to offices held within a state for state purposes, and to many of those laws

(*a*) 4 Wheat. 518.

concerning civil institutions, which must change with circumstances, and be modified by ordinary legislation; which deeply concern the public, and which, to preserve good government, the public judgment must control. That even marriage is a contract, and its obligations are affected by the laws respecting divorces. That the clause in the constitution, if construed in its greatest latitude, would prohibit these laws. Taken in its broad unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a state, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions, which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances. That as the framers of the constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous, and so repugnant to its general spirit, the term 'contract,' must be understood in a more limited sense. That it must be understood as intended to guard against a power of at least doubtful utility, the abuse of which had been extensively felt; and to restrain the legislature in future from violating the right of property. That anterior to the formation of the constitution, a course of legislation had prevailed in many, if not in all, of the states, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief, by restraining the power which produced it, the state legislatures were forbidden 'to pass any law impairing the obligation of contracts,' that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and that since the clause in the constitution must in construction receive some limitation, it may be confined, and ought to be confined, to cases of this de-

scription; to cases within the mischief it was intended to remedy. The general correctness of these observations cannot be controverted. That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us, is not to be so construed, may be admitted. The provision of the constitution never has been understood to embrace other contracts, than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces. Those acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties because it has been broken by the other. When any state legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it without the consent of the other, it will be time enough to inquire, whether such an act be constitutional." "If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the state of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States. But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves; there may be more difficulty in the case, although neither the persons who have

made these stipulations, nor those for whose benefit they were made, should be parties to the cause. Those who are no longer interested in the property, may yet retain such an interest in the preservation of their own arrangements, as to have a right to insist, that those arrangements shall be held sacred. Or, if they have themselves disappeared, it becomes a subject of serious and anxious inquiry, whether those whom they have legally empowered to represent them forever, may not assert all the rights which they possessed, while in being; whether, if they be without personal representatives who may feel injured by a violation of the compact, the trustees be not so completely their representatives in the eye of the law, as to stand in their place, not only as respects the government of the college, but also as respects the maintenance of the college charter." At page 548 he said: "This is plainly a contract to which the donors, the trustees and the crown, (to whose rights and obligations New Hampshire succeeds,) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the faith of which, real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the constitution, and within its spirit also, unless the fact, that the property is invested by the donors in trustees for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the constitution. It is more than possible, that the preservation of rights of this description was not particularly in the view of the framers of the constitution, when the clause under consideration was introduced into that instrument. It is probable, that interferences of more frequent recurrence, to which the temptation was stronger

and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the state legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say, that this particular case was not in the mind of the convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception. On what safe and intelligible ground can this exception stand? There is no expression in the constitution, no sentiment delivered by its contemporaneous expounders, which would justify us in making it. In the absence of all authority of this kind, is there, in the nature and reason of the case itself, that which would sustain a construction of the constitution, not warranted by its words? Are contracts of this description of a character to excite so little interest, that we must exclude them from the provisions of the constitution, as being unworthy of the attention of those who framed the instrument? Or does public policy so imperiously demand their remaining exposed to legislative alteration, as to compel us, or rather permit us to say, that these words, which were introduced to give stability to contracts, and which in their plain import comprehend this contract, must yet be so construed, as

to exclude it? Almost all eleemosynary corporations, those which are created for the promotion of religion, of charity, or of education, are of the same character. The law of this case is the law of all. In every literary or charitable institution, unless the objects of the bounty be themselves incorporated, the whole legal interest is in trustees, and can be asserted only by them. The donors, or claimants of the bounty, if they can appear in court at all, can appear only to complain of the trustees. In all other situations, they are identified with, and personated by, the trustees; and their rights are to be defended and maintained by them. Religion, charity, and education, are, in the law of England, legatees or donees, capable of receiving bequests or donations in this form. They appear in court, and claim or defend by the corporation. Are they of so little estimation in the United States, that contracts for their benefit must be excluded from the protection of words, which in their natural import include them? Or do such contracts so necessarily require new modelling by the authority of the legislature, that the ordinary rules of construction must be disregarded in order to leave them exposed to legislative alteration? All feel, that these objects are not deemed unimportant in the United States. The interest which this case has excited, proves that they are not. The framers of the constitution did not deem them unworthy of its care and protection. They have, though in a different mode, manifested their respect for science, by reserving to the government of the Union the power 'to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.' They have so far withdrawn science, and the useful arts, from the action of the state governments. Why then should they be supposed so regardless of contracts made for the advancement of literature, as to

intend to exclude them from provisions, made for the security of ordinary contracts between man and man? No reason for making this supposition is perceived. If the insignificance of the object does not require that we should exclude contracts respecting it from the protection of the constitution; neither, as we conceive, is the policy of leaving them subject to legislative alteration so apparent, as to require a forced construction of that instrument in order to effect it. These eleemosynary institutions do not fill the place, which would otherwise be occupied by government, but that which would otherwise remain vacant. They are complete acquisitions to literature. They are donations to education; donations which any government must be disposed rather to encourage than to discountenance. It requires no very critical examination of the human mind to enable us to determine, that one great inducement to these gifts is the conviction felt by the giver, that the disposition he makes of them is immutable. It is probable, that no man ever was, and that no man ever will be, the founder of a college, believing at the time, that an act of incorporation constitutes no security for the institution; believing, that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the legislature. All such gifts are made in the pleasing, perhaps delusive hope, that the charity will flow forever in the channel which the givers have marked out for it. If every man finds in his own bosom strong evidence of the universality of this sentiment, there can be but little reason to imagine that the framers of our constitution were strangers to it, and that, feeling the necessity and policy of giving permanence and security to contracts, of withdrawing them from the influence of legislative bodies, whose fluctuating policy, and repeated interferences, produced the most perplexing and injurious embarrass-

ments, they still deemed it necessary to leave these contracts subject to those interferences."

§ 263. It has also been held, that an act of the legislature declaring that certain lands which had been purchased for the Indians, should not thereafter be subject to any tax, constituted a contract within this clause of the federal constitution which could not be rescinded by a subsequent legislative act, so as to admit of taxing such land when held by grantees deriving title from the Indians. Marshall, Ch. J., held, that every requisite to the formation of a contract was found in the proceedings between the then colony of New Jersey and the Indians. The subject was a purchase on the part of the government, of extensive claims of the Indians, the extinguishment of which would quiet the title to a large portion of the province. A proposition to this effect was made, the terms stipulated, the consideration agreed upon, and in consideration of which the Indians executed a deed of cession. That this was a contract clothed in forms of unusual solemnity. The privilege, though for the benefit of the Indians, was annexed by the terms which created it to the land itself, and not to the person. That the contract had been impaired by a law which annulled an executed part of the rights secured by this contract.(*a*) The same principle was also adopted and applied in the case of *Osborne* v. *Humphrey*;(*b*) and also in the case of *Atwater* v. *Woodbridge*.(*c*) In the last case it was said, that property given under the statute, so long as it is applied to the uses designated, must forever retain the rights and privileges attached to it, at the time of the grant: that the government made a contract with all

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(*a*) *New Jersey* v. *Wilson*, 7 Cranch, 164.
(*b*) 7 Days' R. 335.
(*c*) 6 Con. R. 228.

such persons as might be disposed to give their property to those religious purposes and charitable uses, that it should forever be exempted from taxation: that a right in the grantees, donees, devisees or legatees, became vested, which no subsequent legislature could divest. They had a right, at all times, to prescribe the terms on which any future grants or donations should be made or given; but they had no constitutional right or power, either directly or indirectly, to impair former grants, or to lessen their natural productiveness. Taxation might be a worm at the root, which, in its consequences, might destroy both root and branch.

§ 264. The legislature of Georgia authorized the sale of a tract of wild land belonging to the state, and a grant thereof was made by letters patent, in pursuance of that authority, to the Georgia Company. A succeeding legislature declared the act to be void. It was held, that the former grant was an executed contract, and that the former act could not be repealed, so as to rescind a sale under it, without impairing the obligation of an executed contract.(*a*) Upon the same principle, the supreme court of North Carolina declared an act to be unconstitutional and void, which repealed a statute granting land to the University in that state.(*b*) Where a town, that held lands by grant for the use of schools therein, decided to sell the lands, and procured an act incorporating certain persons as trustees, and authorizing them to sell the lands and put the proceeds at use, applying the interest to the support of schools, and empowering them to fill vacancies in their own board: this was held to constitute a contract, and that a subsequent statute authorizing the town to choose new trustees, and directing

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(*a*) *Fletcher* v. *Peck*, 6 Cranch. 87.

(*b*) *University* v. *Foy*, 2 Hayw. 310; *Drew* v. *Foy*, 1 Murphy, 58.

the former trustees to deliver the property, was within this clause of the constitution, and therefore void.(*a*) It has been held, that this constitutional restriction extends to all rights arising under all contracts, whether written or parol, whether expressed or implied, whether arising from the stipulation of parties, or accruing by the operation of law; and that this restriction must be considered as rendering void any statute which is retrospective, provided it destroys a vested right of action arising *ex contractu*. It was upon this ground, that in the case of *Lewis* v. *Brackenbridge*,(*b*) it was held, that when bail was absolutely fixed, and had no further time, the right of the judgment creditor to his debt from the bail was a vested right, arising *ex contractu*, of which right no subsequent legislative act could deprive him. Upon the same principle an act of the legislature of Vermont, which released the body of a debtor from imprisonment, and also directed that the bond which he had given to the sheriff for the prison liberties, and which the sheriff had assigned to the creditor, should be discharged, was within this constitutional prohibition.(*c*) So too, where by a patent, a tract of land was granted to A, including a river not navigable, without any reservation, or any restriction in the use of the river—it was held, that a subsequent statute which required A to alter his dam on the river, so as to let salmon pass up, impaired the obligation of the contract contained in the patent, and was therefore void.(*d*)

§ 265. The question has several times been under consideration, whether statutes of limitation to take

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(*a*) *Trustees, &c.* v. *Bradbury*, 2 Fairfield, 118; *Norris* v. *Trustees of Adington Academy*, 7 Gill & John. 7.

(*b*) 1 Blackf. R. 220.

(*c*) *Starr* v. *Robinson*, 1 Chip. 257.

(*d*) *People* v. *Platt*, 17 J. R. 195.

effect instanter, and affecting antecedent existing rights, were in conflict with the constitution as impairing the obligation of contracts? Although ordinary statutes of limitations to actions are not within this clause, yet if such a statute should be passed which does not allow a reasonable time after the passing thereof, for the commencement of suits on existing causes of action, such an act would be unconstitutional.(*a*) The authority of the legislature to pass statutes of limitation, in the form in which they are usually enacted, is not to be denied. Such statutes have been considered salutary in their consequences. With respect to personal actions, they serve to render people attentive to the early adjustment of demands, and prevent the disturbance of settlements which have been made, but of which the proof may have been lost. But in all such cases the legislature have allowed a certain time *after* the passage of the law, and before its operation should commence, within which the creditors might institute legal process for the recovery of the debts due them, if they should incline so to do. And it is very clear that if no such interval is allowed, but the act is permitted to take effect *instanter*, thereby depriving creditors at once of all legal remedy for the recovery of those demands which it purports to bar, it unquestionably violates the constitution, by "impairing the obligation of contracts," and the courts would be bound to consider it void.(*b*) In *Call* v. *Hagger*,(*c*) an objection was taken to a statute of limitation, on the ground of its being unconstitutional. The court observe —"To extend this principle to acts for the limitation of

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(*a*) *Call* v. *Hagger*, 8 Mass. R. 430; *Proprietors of Kennebeck Purchase* v. *Laboree*, 2 Greenleaf, 294; *Society* v. *Wheeler*, 2 Gall. 141; 3 Peters' R. 290; *Blackfoot* v. *Peltier*, 1 Black. 36.

(*b*) *Proprietors of the Kennebeck Purchase* v. *Laboree*, 2 Greenleaf, 294.

(*c*) 8 Mass. R. 430.

suits at law, which when enacted with discretion, *and a reasonable time allowed for the commencement of suits on existing demands*, are wholesome and useful regulations, would be extravagant." But in that case, the court did not allow the limitation to extend to actions on bonds where the escape had taken place before the passing of the act, and a right of action had vested in the creditor. Mr. Justice Story says: "If the legislature were to pass an act of limitations, by which all actions upon *past dissezins* were to be barred, without any allowance of time for the commencement thereof *in futuro*, it would be difficult to support its constitutionality, for it would be completely retrospective in its operation on vested rights."(*a*) Chief Justice Marshall has said—"If in a state where six years may be pleaded in bar to an action of *assumpsit*, a law should pass declaring that contracts *already in existence*, not barred by the statute, should be construed to be within it, there could be little doubt of its unconstitutionality. So if a law should declare that contracts entered into, and reserving legal interest, should be *usurious and void*, either in whole or in part, it would impair the obligation of the contract, and would be clearly unconstitutional."(*b*)

§ 266. The following cases have been held not to come within this constitutional restriction:—1st. It has been held, that a state law may be retrospective in its character, and may even divest vested rights, without violating this clause of the constitution, provided it does not impair the obligation of a contract. Thus it was held in the case of *The Proprietors of the Charles River Bridge* v. *The Proprietors of the Warren Bridge*,(*c*) that

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(*a*) *Society, &c.* v. *Wheeler*, 2 Gall. 194.

(*b*) *Sturgess* v. *Crowningshield*, 4 Wheat. R. 122.

(*c*) 11 Pet. R. 420.

where the legislature granted to Harvard College the liberty and power to dispose of a ferry from Charlestown over Charles River to Boston, and to receive rent for the same, and afterwards incorporated a company to erect a bridge over the same river in the same place where the ferry had been used, the company paying annually to the college £200, the charter of the latter company giving it the right to take tolls for forty years, which was subsequently extended to seventy years; that the legislature might before the expiration of the forty years, authorize the erection of another bridge from Boston to Charlestown over Charles River, and in such proximity to the former bridge as to injuriously affect the tolls of the first bridge company. The decision of this case was based upon the ground that the charter to the company did not create a contract on the part of the state with that company, that no other company should be incorporated with like privileges, if the convenience of the public demanded, or the legislature thought fit to grant it, and hence there was no contract existing, the obligation of which was violated by this act.(*a*)

§ 267. The legislature may constitutionally enact laws to render valid and legal the doings of public officers who have exceeded their authority, although by such laws individuals may be deprived of rights previously vested; and the objection that they impair the obligation of contracts does not apply to them.(*b*) The legislature may also make provision by statute curing or obviating defective forms of acknowledgment of deeds to pass real estate, and give to such acknowledgments the

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(*a*) But see *Ward* v. *Barnard*, 1 Aik. R. 121; *Lyman* v. *Mower*, 2 Vermont Rep. 517; *Kendall* v. *Dodge*, 3 id. 360.

(*b*) *Walter* v. *Bacon*, 8 Mass. R. 468, 472; *Lock* v. *Dane*, 9 id. 360, 363; *Patterson* v. *Philhart*, 9 id. 151, 153.

same efficacy as if they had originally been taken in the proper form; and such acts although they extend retrospectively to deeds acknowledged previous to their passage, do not impair the obligation of a contract, and that for the reason that they do not touch any title acquired under the deed. They assume the title to be good, and prevent the contract from being impaired by reason of a defective acknowledgment; or in other words, their legal operation goes to confirm, and not to impair the contract.(*a*)

§ 268. It has also been held, that a statute providing under certain circumstances, for the suspension of the proceedings of a bank, by an injunction from the supreme court, was not unconstitutional on the ground that such suspension diminished the period for which the bank was, by its charter, empowered to act as a corporation.(*b*) In this case it was conceded by the court, that an act of incorporation was to be construed to be a contract between the government, on the one side, and those who accept and become a corporation and their successors, on the other; and could not be revoked or annulled by an after act of legislation, unless a power had been reserved for that purpose, or with the consent of the corporation. But in applying this rule practically, it was necessary to consider, how far and to what subjects this contract extended. It was clearly a stipulation on the part of the government, that the corporation should be and continue a corporation for an indefinite time, or for the term limited in the act, unless sooner forfeited for some cause recognized by existing laws as a case of forfeiture; that their constitution, organization, and mode of action, as prescribed by their charter, should not be annulled or

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(*a*) *Watson* v. *Mercer*, 8 Pet. 88.

(*b*) *Commonwealth* v. *Farmers' and Mechanics' Bank*, 21 Pick. 542.

changed by the legislature; that members should not be added or removed, that modes of election, expulsion, and suspension of members, should not be altered; that whatever belonged to their organic constitution and action, as bodies politic, should continue and be determined by the terms of the charter. In addition to which, the powers specially granted to them, were not to be withdrawn or diminished. But such immunities and privileges did not exempt corporations from the operation of those laws made for the general regulation and government of the citizens. In answer to the objection taken to this act, "that it diminished the rights of corporations as such, and thereby impaired the obligation of contracts, that it diminished the time for which, by charter, they were empowered to act as such corporation, to wit, all the time until 1851; that granting an injunction, before a hearing, might diminish this term of unrestricted action, because the injunction might go to the entire suspension of their corporate functions, did diminish the time for which they were expressly authorized to act;" it was held, that the suspension was not an arbitrary diminution of the period of their organic existence as a corporation. They were incorporated on many conditions, some express, and some implied by law. The most obvious one was, that they should comply with the terms of their charter; one of which was, that they should conduct their business according to banking principles, and the rules of law. As they might violate the provisions of their charter, and incur a suspension or forfeiture, there must be some mode prescribed for a judicial inquiry into the fact, whether they had so violated the terms of their charter, and for providing redress for those who might have suffered from such violation. The violation might be of such a nature, as more directly to affect the rights of individuals, who might have their remedies by suits at law or in equity, as the case re-

quired; and they might obtain security for their violated rights by attachment, sequestration, or such other process as the law furnished, either before or after obtaining judgment. But the violation might be of such a nature, as to affect the rights of great numbers, so that it might be considered as an injury to the community at large, in which case, it was more consistent with public safety and convenience, and entirely consonant to the whole course of the administration of justice, to institute a process in the name and under the authority of the government, bound as it was to provide security for its citizens. When, therefore, the law provided for the commencement of such a process, upon such probable grounds as should be deemed sufficient to justify a well founded apprehension of misconduct, it was not an arbitrary suspension of the corporate powers of the bank, but a species of compulsory process, analogous to the constant course of action in similar cases, designed to take the subject of controversy into the custody of the law, during the inquiry, to prevent further progress in a course thus probably shown to be mischievous and dangerous, and to secure the means of affording redress to the sufferers, in case the misdemeanors alleged should be found to exist.

§ 269. It has been held, in several cases in Massachusetts, that statutes changing estates of joint-tenancy into a tenancy in common, although it extended to past grants and devises, was not within this clause of the constitution, as their operation was not to impair any vested right, but rather to render the tenure more beneficial.(*a*) In the first case cited, Parsons, Chief Justice, placed the decision on the ground, that the legislature might alter the tenure by the substitution of one more beneficial. In the

(*a*) *Holbrook* v. *Finney*, 4 Mass. R. 566. *Miller* v. *Miller*, 16 Mass. R. 59. *Burghardt* v. *Turner*, 12 Pick. 534.

second case above cited the court conceded, that the legislature could not impair the title to estates without the consent of the proprietors unless for public objects, when an adequate consideration should be provided, but that there could be no objection to the operation of a statute retrospectively which should enlarge or otherwise make more valuable the title to an estate; for that in such cases the consent of the owners to the act might be presumed. In a note to this case, the editor suggests a doubt as to the accuracy of the decision in the last case cited. He places the doubt upon the ground, that the judgment could only be maintained, as it would seem, from the express words of the act, which seemed to refer to all conveyances, which had been or should be made. That although a retroactive law, so far as it affected the remedy only, was unobjectionable; but in this case, if the words of the act were to have their full force, rights already vested and acquired under conveyances already made were to be affected, altered, and taken away. But in a subsequent case, the doctrine contained in the two cases above cited was affirmed, and it was held, that it was no objection to the provision of this statute that the deed had been previously made, and had already created an estate in joint-tenancy; that it was the same in legal effect as if it had provided, that upon the future decease of a joint-tenant, under certain circumstances, the principle of survivorship should not operate. That it was not retrospective in the sense of affecting any vested right.(*a*)

§ 270. It has also been held, that an act appropriating, in the exercise of eminent domain, to the public use, property previously granted to an individual, was not under this restrictive clause of the constitution. Although it was held, that a grant of land was to be re-

(*a*) *Burghardt* v. *Turner*, 12 Pick. 539.

garded as a contract within the meaning of the constitution, and that such grant could not be revoked by a state legislature, yet that there could be no doubt, but that land granted by the government might be taken by the legislature, in the exercise of the right of eminent domain, on payment of an equivalent, and that such an appropriation was not a violation of a contract by which property, or rights in the nature of property, and which might be compensated for in damages, were granted by the government to individuals.(*a*) The decision in the case last cited might be placed upon another ground, to wit, that as the right of eminent domain is an inherent sovereign power, admitted and recognized under all governments; that right gives to the legislature the control of private property for public use. This fundamental principle of all governments may be considered as a condition annexed to all grants of land, and as such, entering into and forming a part of the contract, in all grants of this character, and subject to which all such grants are held. Thus entering into and forming a part of the contract itself, the exercise of this right cannot in any just sense be said to impair the obligation of such contract.

§ 271. It will not impair the obligation of a contract created by the grant of a charter, if the property of the corporation be taken for the public use. Even if the powers of the corporation be thereby suspended, or the corporation itself dissolved.(*b*) An act of the legislature made without any consideration, and intended as a mere gratuity, executory in its character, and unexecuted in fact, does not in fact create such a vested right or con-

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(*a*) *Boston Water Power Co.* v. *Boston and Worcester Rail Road Co.*, 23 Pick. 360.

(*b*) *Backus* v. *Lebanon*, 11 N. H. 19. See also *The Proprietors to the Piscataqua Bridge* v. *The New Hampshire Bridge*, 7 N. H. 35. *Barber* v. *Andover*, 8 N. H 398.

tract as that it may not be changed or defeated by subsequent acts of legislation.(*a*) This decision in the case last cited was placed upon the ground that the act was executory; that the constitution had adopted a distinction between contracts executory and executed, and did not mean togive any efficacy to nude pacts, nor to create new obligations, but to preserve all the obligatory force of contracts, and that all such executory contracts as it protected were such, and only such, as were founded on a sufficient consideration; that the act was a mere promise to collect and pay over a fund, and that as a mere gratuity. This promise to collect, and the promise to deliver might be retracted at any time before it was executed, without impairing the obligation of any contract.

§ 272. Although marriage is a civil contract, it is evident from the nature of the obligation it imposes, from the appropriate remedies, when they are violated, and from reasons which must have actuated the framers of the constitution of the United States, that general laws, providing for the dissolution of existing marriages, but operating upon transactions subsequent to their passage, are not within this clause of the constitution.(*b*) A private act of the legislature authorizing the sale of the estates of infants, for their maintenance and education, is within the scope of the legitimate authority of a state legislature, and is not within this prohibitory clause of the constitution.(*c*)

§ 273. It is also by the same section of the federal constitution declared, that "No state shall, without the consent of the congress, lay any imposts or duties on imports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports shall be

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(*a*) *The Trustees of the Bishop's Fund* v. *Reder*, 7 Conn. R. 99, N. S.
(*b*) *Clark* v. *Clark*, 10 N. H. 380.
(*c*) *Cochran* v. *Van Surlay*, 20 Wen. 365.

for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress. No state shall, without the consent of congress, lay any duty or tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." We have already, when considering the powers of congress, considered the cases which have arisen under that branch of this clause which relates to states laying imposts, or duties on imports or exports. It will therefore be unnecessary to advert to them in this connection.

CHAPTER IX.

OF CONSTITUTIONAL RESTRICTION UPON LEGISLATIVE POWER.

§ 274. HAVING considered in a previous chapter the restrictions upon legislative power under the federal constitution, we shall in the next place consider those which are contained in the constitutions of the respective states. These may be considered as divided into two classes. Those which restrict legislative action, unless certain conditions precedent are complied with, which are necessary to give validity to a legislative act; and those which are absolute and imperative in all cases, and operating *per se* as an absolute and unqualified restriction upon legislative power. An instance of the former kind is to be found in the constitution of New York of 1821, art. 7, sec. 9, which provides, "The assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes, or creating, continuing, altering, or renewing every body politic or corporate. In the same class may be ranked the provision, that private property shall not be taken for public use without just compensation, nor unless the public exigencies require it. In the latter class are such provisions as declare that no sanguinary laws shall be passed, nor bills of attainder or *ex post facto* laws, nor laws which impair the obligation of a contract, and all provisions of a similar character.

§ 275. Under the constitution of New York of 1821,

the question has frequently arisen as to what bills are two-third bills within the meaning of sec. 9 of art. 7. This question has been considered under two heads: 1st, what is a bill appropriating the public moneys or property for local or private purposes? 2d, what, within this clause, are bills creating, continuing, altering, or renewing a body politic or corporate? The question arising under the first head, to wit: what is a *bill appropriating the public moneys or property for local or private purposes?* has seldom, if ever, been the subject of judicial determination, although the question as to what is a public use of property, has been frequently judicially determined. It has, however, frequently come under consideration in legislative committees, and by presiding legislative officers. It has also several times been discussed and passed upon by the attorney general of this state. It has elicited much conflict and contrariety of opinion. The limits of this work will not admit of our giving a detailed statement of the respective opinions which have been expressed on this point.

§ 276. On a former occasion, and in another capacity, we submitted to the public our views as to the construction which should be given to this clause in our state constitution; and we have seen no reason since that time for a change of opinion. In expounding a constitutional provision, the same rules of construction and of interpretation should obtain as are adopted and applied in the construction of a statute. One rule is, that such a construction should be put upon a statute as will prevent any clause, sentence, or word from being superfluous, void, or insignificant; and where the words used will allow of a double meaning, such a construction should be adopted as will allow some meaning to all the words used. With these rules in view, what is the true construction of this clause in our constitution? Such a construction should be put upon this clause in

the constitution as will give full force and effect to the respective words "*public*," "*private*," and "*local*." The word *local*, as contradistinguished from the words *public* and *private*, should be held to embrace all that is intermediate—an *individual person* or *interest* on the one hand, and the *aggregate body politic* on the other, but *exclusive* of *both*. The word *private* to relate to an *individual person* or *interest*, *exclusive* of what is comprehended in the words *local* or *public*; and the word *public* should be limited to the *whole body politic* in its *aggregate* and *indivisible* character. A purpose may be purely local, without being *public* or *private*, or *private* without being *public* or *local*, or *public* exclusively without being *local* or *private*. A purpose purely public, must be one where the unity of interest is concentrated in the whole aggregate body politic. To give full force and effect to the word local, in the sense in which it is used in this clause of the constitution, every grant of the public property for a particular purpose, however near its beneficial effects or community of interest may approximate the unity of interest in the whole body politic, whenever it falls short of that, such purpose falls under the denomination of a *local* one, and is included within the circle of restraint which the framers of the constitution have, by the term "*local*," prescribed. A grant to an individual, or an association of individuals, where the right, privilege, use, or profit arising from such grant, is one in which the whole body politic do not either participate or share in common with such individual or community of individuals, or do not derive any common benefit therefrom *as a body politic*, falls under the denomination of a grant for a private use. A grant, tributary to a fund or object, where the rights, privileges, use and profits, arising from the use of such fund, or the prosecution of such object, are to result to and be owned, possessed, used and enjoyed by the whole body politic, in an aggre-

gate capacity, would be a grant for a public purpose in the sense in which that word is here used. By limiting the word *public* to the *aggregate body politic*, and the term *local* to the *intermediate* of that *aggregate* and an *individual person* or *interest*, and the word *private* to such *individual interest* or *person*, *each* and *every* the words "public," "local," and "private," have their appropriate meaning and significancy; and when collectively considered, include the whole scope of the evident intent of the framers of the constitution. This construction makes the word "public" as the outer line of this constitutional circle; the words "local," and "private," comprehend all the lesser lines of the circle, whether the ratio of their position in the radius of such circle be as 999 to a thousand or one to a thousand. To enlarge the sense of either of these words would be dangerous in the extreme; for, by such a construction, the lines of demarcation between a purpose purely *public*, or *local*, or *private*, would be made so indefinite and indistinct, or would be so blended together, that it would be next to impossible to say at what point in the radius of this circle the one was to commence, or the other to terminate. If the word *public* should be construed as meaning any thing *less* than the *indivisible aggregate body politic*, then the word *local* would be rendered wholly insignificant and useless. It would be impossible to determine how near the hand of legislative munificence might approximate an *individual*, or *private*, or *local interest*, without passing the line of demarcation which the framers of the constitution intended to establish as a limit to legislative donations. Such a construction would authorize the majority of the legislature, at their discretion, notwithstanding the constitution, to approach the center or verge of this constitutional restriction so near, that in effect, to all practical purposes, the distinction between a purpose *purely public*, or *purely local*, or *private*, would be one without

any essential difference. This, instead of giving *full force and effect* to all the words used, would render them synonymous—impair their force, destroy their significancy, make them useless, weak, and imbecile, as well as violate a fundamental rule of construction.

§ 277. The construction or sense now put upon the respective words used, is also one which is consonant with the immutable principles of natural justice. When it is considered that the grant in these cases proceeds from the *body politic* in its *aggregate capacity*, natural justice demands that the equivalent for such grant should be received by it in the *same capacity*. The legislature in making a grant for a particular object, before deciding that such purpose was a public one, should be able to discover that some equivalent for the grant would ultimately be returned to the same hand from which the grant emanated, and be held by it in the same aggregate capacity, as was the thing which was the subject of the grant. Not that it must perceive that the benefit that will result to the state, as such, must in every instance be an adequate consideration for the thing granted, although such a policy would doubtless be a wise and salutary one, but it should have no reasonable doubt that the state would ultimately be beneficiaries of the grant, either *by an increase of its revenue, or an enhancement of its public property*, or a *diminution* of its *necessary public expenditures*. A purpose which contributes to none of these interests, ought not to be considered a *public purpose*. In deciding whether a purpose to which the thing granted is to be applied is *public, local, or private*, the inquiry should not be whether the grant itself will enable the recipients of it the better to accommodate the community at large, but it should be directed to the inquiry, who is to be the recipient of the profits or benefits to be derived from the use and enjoyment of the thing granted, and whether there will any benefit flow from it, or

its use, into the common treasury; or will it tend to an *increase* of the revenue or to the enhancement of the value of the *common property* of the state held in its aggregate capacity, or to diminish the *necessary public expenditures?* If neither the *common treasury* of the state, nor its *common property* can derive any benefit, or the *common expenses* will not be diminished, in case the enterprise proves successful, if the thing granted is not to be used by the public indiscriminately, then the purpose should be regarded as *local* or *private*. Were the doctrine to be admitted, that the legislature might by a majority vote, grant the public property, whenever their imagination could conceive that some incidental accommodation might result to the public from the use to which the thing granted was to be appropriated, and that such circumstance should take such grant out of this clause in the constitution, this restriction instead of proving a wall of defence, would become a mere cob-web barrier, its very weakness and fragility inviting attack, and this constitutional safeguard would not only be wholly inefficacious, but the great end and aim of the framers of this instrument, the object and design of this restriction, would be entirely defeated. Such a doctrine would also be in direct hostility to another fundamental rule of construction, which should be applied with all its force to a constitutional restriction on legislative power, imposed by the people (the source of all power) in their sovereign capacity, that is, *that every law should receive such a construction as not to elude its force, or render it vain and illusive.* So far, the consequences of a particular construction ought to be considered, and have due weight and influence on the construction of a constitutional limitation upon political power.

§ 278. In putting a construction upon this clause of the constitution, resort has been had to the last clause of the 7th section of article seventh of the same instru-

ment, which provides, that "*private property shall not be taken for public use without just compensation*," and the doctrine has been advanced, that because it has been decided by the Chancellor, and the court of dernier resort, that the taking of private property, to be used for a railroad, was taking it for a *public use*, within the spirit of this clause; that because such corporations were public and not private, the public property might be appropriated to the purpose of such corporations by a majority vote. This doctrine, if admitted as applicable to the question under consideration, would remove all constitutional protection to the public property, and make the restriction *vain and illusive*. It has also been decided by equally high judicial tribunals, that banks are *public* corporations —that, as they facilitate exchanges, and afford a circulating medium and a currency for the country, they are created for public purposes. If the public money may be appropriated by a majority vote to a railroad company to aid it to complete a road, which, when completed, is to be a corporate property, and not public, because the public may derive accommodations from that road, it cannot be perceived why, by a parity of reasoning, such an appropriation may not also be made to a bank, as part of its capital, to be used as a basis of its circulation, because such circulation will accommodate the community. The one is just as much a *public* corporation created for *public purposes*, as is the other. Both, by judicial decisions, are declared public corporations, created for public purposes. The doctrine would hardly be tolerated, that because banks were public corporations, created for public purposes, that the public property might, by a majority vote, be donated to such institutions as part of their capital.

§ 279. It by no means follows because a corporation is public, when it is created for the promotion of private or corporate interest, and the amount appropriated goes

into the general fund or capital stock of such corporation, because the use of that capital thus employed, (to promote private ends,) may incidentally accommodate the public; that hence such an appropriation is for a *public purpose*. The purpose in such cases should be considered as private or local. The accommodation of the public, growing out of the use to which the sum donated is to be applied, does not and cannot make such appropriation one for a public purpose, within the spirit of the constitution. If it would, then any sum might by a majority vote, be donated to any number of individuals for the purchase of horses and stages, to run between Albany and New Orleans, for the carriage of passengers or property, for a just and reasonable compensation, to be paid to and divided between such individuals, for then the accommodation would be public, but the use or purpose private.

§ 280. Care must be taken not to confound the distinction between the import of the word *purpose*, as it is employed in the ninth section of the seventh article, and of the word *use*, adopted in the seventh section of the seventh article, of the constitution. What then is the true import of the word *purpose* in the one case; and of the word *use* in the other? They are by no means used as synonymous terms, or in the same sense. The word *purpose*, in the sense here used, is confined within a narrower circle, than is the word *use* in the other clause. It is restricted to the thing or object which is the residuum of the thing granted, or rather to that of which it is to become a constituent part, and there terminates: while the word *use* is far more comprehensive, and takes a more extensive range, embracing objects and things growing out of, and incidental to, the original purpose, extraneous from the purpose itself, and taking effect after that purpose is consummated and at an end. This distinction is one that has been recognized and adopted

in the construction of this constitutional limitation, contained in said ninth section of the seventh article. In the case of the bill to aid in the construction of a road through the oil spring reservation, the bill provided for a grant of $420 of the public money, to be applied in construction of that road. This distinction was taken by Mr. Talcott, the then Attorney-General: In that case the purpose of the appropriation was to complete, or aid in the completion of the road; that was a *local* purpose, although the USE of the road when completed was to be dedicated to the public or a public use. In that case the public use was one which would be entirely free and untrammelled by any exclusive chartered privileges of a corporation. There the word purpose was restricted to the sense now adopted, and would have had its consummation before the *use* (which was public) would have fairly commenced. Had the question submitted to the Attorney General in that case been, whether the legislature could under the seventh section of article seventh of the constitution, take private property for this road, making just compensation therefor, it must have been answered in the affirmative. On the other hand, had the question submitted been, whether the legislature could, by a majority vote, grant property which belonged to the state for the same purpose as the money, it must have been answered in the negative, on the ground that it would be as clearly within the circle of this constitutional restriction, as was an appropriation of $420 of public money to be applied to that purpose.

§ 281. "No statute or law should receive such a construction as will lead to absurd consequences." Respect for the framers will always induce courts, when a particular sense applied to a word will lead to such consequences, to infer, that such was not the sense in which it was used. To hold that the word purpose embraces

within it all the consequences which might flow, or result, from an act to which the thing granted might be applied, would lead to such a consequence. It is very much doubted whether a single legislator who should vote for such an act, could be found, so regardless of character, so destitute of moral sensibilities, and so reckless of consequences, as to be willing to be considered in the eye of the law as criminally or morally responsible for all the consequences, contingent or remote, which might thereafter result to society from the use to which property under such an act should be devoted, or be considered in voting for such an act, to have purposed such consequences and results. This sense, too, is consonant to one in which the word purpose is not unfrequently used. Thus, when it is said that the Creator of the Universe purposed to create man, it is understood that the creative energies of Omnipotence were to be directed to the formation of an organic frame, which should be subject to certain fixed rules and laws, to impart to that frame vital energies, and to endow it with certain physical, mental, and moral powers and capacities. This was the *sum* of the purpose to which those creative energies were to be directed, and marked the boundaries within which that purpose was confined. The purpose to create did not extend itself over the wide range of human action, or of human depravity, which might, or which did, thereafter flow from the exercise of those faculties thus created, nor were these comprehended within the original purpose of creation, when, in the councils of eternity, it was said, "*Let us make man.*"

§ 282. We shall next proceed to demonstrate, if possible, the accuracy of the construction we have adopted by reference to decisions which have been made on this question, in addition to the one above referred to. In 1843, the then president of the senate declared a bill to be a majority bill which, in effect, released to a rail road

corporation a $3,000,000 debt due to the state. That decision, we are aware, must be regarded as in direct conflict with the construction which we have put upon this clause. But we apprehend, that nearly all the other decisions which have been made under this clause, stand opposed to that decision, and according to our understanding of such decisions, most of them are in perfect harmony with our construction of this clause; such of them as do not must be regarded as standing opposed to the letter as well as spirit of the constitution. There are certain considerations worthy of special note, in reference to that decision, before proceeding to the consideration of the extent to which it is sustained by other decisions which have been made under this clause. It should be remarked, that the act of incorporation of the company to whom that debt was released, clothed it with certain rights, immunities, and privileges, to be exercised, used, and enjoyed by it for a period of years, exclusive of the public; among which was the right of the acquisition of property, which when acquired, became corporate not public property. It imposed no obligation whatever on the corporation to use its road when completed in any particular manner in reference to the public; nor was such use one of common law right. The duties and obligations of a common carrier did not attach to it unless thereafter it should voluntarily assume such obligations and duty. Its own use of the road was one of entire discretion, and the use of it by others for a period of years might be granted or denied as would best subserve its corporate interest, or gratify corporate caprice. It contemplated no increase of the public revenue, no enhancement of the public property, no diminution of the necessary public expenditures. Its claims were never urged on either of those grounds. It was not connected at either point of its termination with any great public work owned and prosecuted by the

state. To all human appearance, its tendency would be to divert travel and business from those internal artificial arteries, owned and sustained by the public revenue, and would necessarily detract from the sources of revenue necessary to keep them in repair. These considerations are important, because they distinguish that case from a numerous class of cases which have been supposed to be analogous, when, in fact, no such analogy exists. The cases to which allusion is now made, and which have been supposed to be analogous, are the act of 1823 in relation to the Albany pier and basin, the act of the fifteenth of April, 1822, to authorize grants for the purpose of promoting the settlement of public land in the counties of Essex and Franklin, and the act of seventeenth of April, 1822, to authorize and encourage the construction of the harbor of Buffalo creek, all of which were decided to be majority bills. All those acts it will be found have been sustained as majority bills, on the ground that the state was to derive benefit in its aggregate capacity, either because they increased its annual revenue, or enhanced the value of its public property, or diminished the amount of its necessary public expenditures. Mr. Talcott, in his opinion, submitted to the legislature in 1823, in relation to the bill concerning the Albany pier and basin, put all these cases upon this distinct ground; and it was after he had thus distinguished this class of cases from others, that he added:— "If the question was now presented for the first time, it might be a matter of serious consideration how far it would be consistent with prudence to give such a construction to this clause of the constitution, as would exempt from its operation bills passed with a view to contingent or merely probable benefits, or even to a certain one, when there was no sufficient data to estimate its value."

§ 283. It will be perceived, that all those acts which

have thus far been referred to, and which were held to be majority bills, with the exception of the one of 1843, harmonize with our views above expressed. There are other decisions, however, which have by some been considered as in direct conflict with the construction we have adopted. We apprehend, however, that most of them do not; and that those that do, to say the least of them, certainly savor too much of a latitudinarian construction of a constitutional restriction upon the legislative department of the government, to receive our assent to their accuracy. We, however, cannot pass them in this connection without giving them a consideration. The first class to which attention will be directed, are those making loans of the public money, and providing for a security therefor, such, for instance, as the loan to the President and Directors of the Neversink Navigation Company, and to the Hudson and Delaware Canal Company; and those of purchasers of property by the state; such, for instance, as the purchase of the Oneida Lake Canal and Feeder. It is to be regretted, that the language of the then constitution was not sufficiently comprehensive to reach loans of public money, which certainly ought to be included within a constitutional restriction. But as the constitution must, or ought to be construed strictly, on the one hand, nothing should be subtracted therefrom, and on the other, no *casus omissus* can, or should be, supplied by construction. Adopting a strict rule of construction, it is undoubtedly true, that the prohibition in this clause of the constitution, extends only to cases of absolute grants of public money or property, and is not sufficiently broad to comprehend a case of a loan of property or money upon securities; hence such loans are not within this constitutional restriction. There may be cases where a transaction may be characterized by the name of "a loan" when, from the very nature of the security provided for, or from the well

known insolvency and utter worthlessness of the borrower, it may be certain that the transaction was a mere device, or trick to elude the constitution, in which courts would be authorized in deciding, that such trick or device should not be effectual to evade this constitutional restriction, and that a law authorizing a loan under such circumstances, would, for this reason, be unconstitutional and void. Whether a transaction which should be characterized as a loan, is a mere trick or device to elude the constitution, must depend upon the circumstances of each particular case.

§ 284. It has been said, that acts authorizing purchases of property for the state, have been passed by a majority vote, and that such acts thus passed have tacitly received a legislative construction. That such acts are not within this clause, is admitted. But at the same time, it must be remarked, there is no statute requiring such acts to be passed by a two-third vote, and there certainly is no such requisition to be found in the constitution. Thus, it will be perceived, that the cases ranked in this class are not in conflict with our view of this clause, nor do they afford any support to a contrary doctrine.

§ 285. Before proceeding to the consideration of the next class of cases, it is proper to correct an error in point of fact, in relation to one case, which otherwise would fall within the second class to which allusion will hereafter be made. It has been supposed that the Neversink Navigation Company, having failed to pay the principal and interest on the loan to them, that debt was *released*, and the stock cancelled and discharged in 1841, by a majority vote. The history of that transaction will show how far this supposition is warranted by the facts. On the 15th of April, 1828, an act was passed authorizing a loan by the Comptroller of $10,000 of the stocks of the state to that company, for the redemption of which the faith and credit of the state was pledged. By the

terms of the act, this loan was to be secured by a mortgage on the rights and privileges of the company in the Neversink river and appurtenances, as granted by the state to that company in 1816. In case of default of payment of the interest on such stock by that company, the Comptroller was authorized to proceed and sell the property, or so much as should be necessary, and on such sale, to purchase for the benefit of the state. The Neversink Company having failed to pay the interest, the Attorney General, under the statute, foreclosed the mortgage; and on the 16th day of September, 1837, the premises were sold and bid in by him for the state at $800, and that property still is owned by the state. The act of 1841, related almost exclusively to the balancing of certain accounts between the several canal funds —but by sec. 7, the treasurer was required to pay on the warrant of the Comptroller, to the commissioners of the canal fund, or to the then stockholders of the STATE STOCKS, $10,000, for the redemption of that amount of such stock, issued under the act of 1828, authorizing the loan of said stock to that company. This act did not in any way discharge or attempt to discharge, or in any way affect the debt due from that company to the state; or in any way affect the security therefor. It simply made provision for the payment by the state of its own debt due to its own creditors.

§ 286. The case of the release of a debt against Myron Holley, has been supposed to be an instance which sanctioned the donating public property for private purposes by a majority vote. The history of that act and its attendant circumstances, will now be stated. That act was passed in 1828. Before its passage, it was referred to the committee on two-third bills in the house, to examine the same, and report whether in their opinion it came within the 9th clause of the 7th article of the constitution, requiring its passage by a two-third vote.

Mr. Paige, one of that committee, submitted a long and able report, in which the committee arrived at the conclusion that it did not. The reasons for that conclusion will clearly show the true ground upon which that decision was placed. The report stated, that the claim against Mr. Holley arose out of supposed deficiencies in his account as a canal commissioner, which the committee were satisfied arose from *unavoidable mistakes*, and losses incident to the duty imposed upon him under the laws of this state; and that there could be no doubt of the obligation of the state upon *legal* principles to indemnify him to the extent of those mistakes and losses. For an agent was only bound to exercise ordinary diligence, and was not responsible in cases of damage or loss happening without his default. That this was a payment of a demand against the state, for services rendered by a public officer in a public capacity. That it was an appropriation for the payment of a just debt. The payment of a debt due by the state, could not be called an appropriation of the public money or property, for the reason the creditors of the state had a claim upon the money in the treasury to the amount of such debt, and only that portion of the money in the treasury which remained after the debts were paid, ought to be called public money. That the claim of Mr. Holley was founded in justice, and was either a *legal or equitable* demand against the state, and the principles of *eternal justice demanded its satisfaction.* For these reasons, it was the opinion of the committee, an appropriation to discharge it, could not be such an appropriation for *local* or *private* purposes as was contemplated by the constitution. In this instance, it will be perceived, that the committee regarded this case as not within this clause on the ground, that it was not one appropriating public property to private use, but one in which the legislatur

made disposition of the property of the state, for state purposes, in payment of a state debt.

§ 287. The next case to which we shall allude, which was decided to be a majority bill, is the act of the 12th of April, 1838, entitled "An Act to authorize the comptroller to cancel a certain bond signed by Alexander B. Johnson and others, citizens of Utica, and for other purposes." The history and attending circumstances of this case, are also important to a right understanding of the principle which it sustains. In the fall of 1838, the canal commissioners fixed the northern termination of the Chenango Canal about three and one-half miles west of Utica, and about one-third of a mile east of Whitesborough. At the ensuing session of the legislature, petitions from the citizens of Utica, and from other parts of the state, were presented to the legislature, praying for a change of the northern termination to Utica, and placing the application solely on the ground of public interest and convenience. In pursuance of those petitions, an act was passed on the 24th March, 1834, authorizing a change of termination, but imposing as a condition, that the Canal Commissioners should first receive security for the estimated difference of expense between the two terminations, and that such security must be given within thirty days. At this time, the canal was under contract, and the contractors were going to proceed immediately with the work. Under these circumstances, the bond was executed, to prevent the termination being forever fixed and the public interest thereby affected for all future time. On the 11th May, 1835, an act was passed authorizing this amount to be assessed upon the real estate in the city of Utica, which act was, in 1838, sought to be repealed, or to have this bond cancelled. The grounds upon which the passage of this act was urged were, 1st. That the

Canal Commissioners, in ascertaining the difference of the cost of the two terminations of the Chenango Canal, having to proceed upon estimates necessarily *conjectural*, had committed an error in fact, and assumed such difference to be upward of $1800 greater than it really was. 2d. That they did not give due weight to the consideration of public utility and convenience, according to the spirit of the act authorizing the northern termination of the canal. 3rd. That the legislature in 1833 had inadvertently proceeded upon a mistaken and unwise policy in allowing the location of a public work to be controlled by the amount of gifts, donations, and grants, as it was by that act. 4th. That due regard to the public interest, required that this canal should terminate at Utica. The grounds upon which the committee on two-third bills, to whom that bill was referred, reported it as a majority bill, were, that the legislature might by a majority vote provide for the payment of a just debt. It was not perceived why it might not in the same way cancel a debt in form, for which paper securities had been created, in CONTRAVENTION OF GREAT PRINCIPLES OF PUBLIC POLICY. The act, in the shape in which it finally passed, is indited in the same spirit, and proceeds upon the same general principles as were urged in favor of its passage. Section 1 required the Canal Board to re-examine the estimate of the cost of the termination of the Chenango Canal at Utica, and of its termination as originally located, and if on such re-examination of such cost, and all other considerations of public interest connected therewith, they should be satisfied that the amount estimated as the difference of cost between the two, for which this bond was given, had been estimated at a larger sum than it ought to have been, then they were authorized to reduce the bond to such sum as in their judgment should be just and equitable. By sect. 2, if the Canal Board should be of the opinion that the

northern termination of this canal should have been at Utica, but for the restriction in the act authorizing its construction, then they were authorized to direct the bond to be cancelled. By sect. 3, if the bond should not be cancelled, but the amount reduced, the commissioners appointed under the act of 11th May, 1835, should reduce the assessment made by them upon the real property in Utica, and the amount thus reduced should be collected pursuant to that act. From this statement of the circumstances attending the passage of this act, it will be perceived that the sum for which this bond was given, was, if the estimate was correct, actually expended on a work undertaken, prosecuted, and owned exclusively by the public. That this expense was one that the public exigencies, as well as convenience required. The public were beneficiaries of it, and the enforcement of the bond would have been in CONTRAVENTION of PUBLIC POLICY. Although that act may be regarded as one where a very liberal and latitudinarian construction was adopted to take that case out of this constitutional prohibition, yet it was a case which might be considered as coming within the spirit of the rule adopted in the case of Mr. Holley, on the ground that upon principles of eternal justice, inasmuch as this sum had been expended to promote the public exigencies, there was in truth and in fact, nothing due to the state on this bond. It must be admitted, however, that this act, and the ground upon which it was urged and passed, as a majority bill, was but another species of political device by which to prostitute the constitution to gratify local feeling and advance private interest, under the cover of the forms of law. We cannot admit the accuracy of this decision, although it does not militate against our construction of this clause.

§ 288. The only remaining cases which have been passed as majority bills, which we shall notice, are, the

act of 4th May, 1840, releasing a judgment in favor of the state against the New York University, which we think was, without doubt, unconstitutionally passed, and the act of 1838, granting $6000 per annum to the Geneva College, $6000 to the University of the city of New York, and $3000 to the Hamilton College. Were these grants appropriations for private or local purposes? There is a general principle which has been settled by the highest judicial tribunal in the United States, which serves as a beacon light, by which we may discover the real character of such donations, and determine whether the purpose was one which was public or local or private. The principle to which allusion is made, is that settled in the case of *Woodworth* v. *The Dartmouth College*. "If an act of incorporation be a grant of political power, or if it create a civil institution to be employed in the administration of the government, or if the funds of the college are to be public property, or if the state as a government be alone interested in its transactions, and the sole recipient of its profits, then it is a grant for a public purpose, otherwise not." This is the true criterion by which to determine whether the purpose of a corporation is a public purpose in the sense in which that word is used in the constitution. In another case,(*a*) it was decided, that the corporation of the regents of the University was a private and not a public corporation. It was not created for political purposes, nor invested with political powers. That if a corporation was at first eleemosynary, and private, no subsequent endowment of it by the state could change its character. It was not sufficient to render a corporation public that its ends were public. Whether a corporation be public or private, depended upon the nature of the franchises

(*a*) *The Regents of the University of Maryland*, 9 Gill & Johns. 365.

granted, and not the expected beneficial results to the community from the possession and exercise of those franchises. If the charters of the colleges we have above referred to, bring them within the rule laid down in the two cases above cited, perhaps a decision that the bill donating to them the public moneys might be sustained under this clause of the constitution. But if not, then we cannot but regard their passage by a bare majority vote, as an act in direct conflict with this clause of the constitution. A decision that they were majority bills, if we rightly understand the true nature of their respective charters, it must be admitted, stands opposed to our view of the true construction of this clause. Isolated instances, however, of a contrary construction, standing in direct opposition to the whole current of decisions on the same subject, cannot be regarded as such a practical construction as to render such decision decisive of the question as to what is the true construction of this clause. A practical construction of a constitutional restriction upon its own powers, by that department of the government upon whom such restriction is imposed, in order to be entitled to much weight should be one commensurate with the constitution itself, uniformly acted upon and acquiesced in since the period of the adoption of the constitution; or, in other words, one continued and unbroken chain of precedent in favor of a particular construction of any given restrictive clause.

§ 289. We shall, in the next place, endeavor to ascertain whether the construction which we have put upon this clause in our state constitution has been overruled by practical legislative precedent in favor of a more latitudinarian construction. We by no means admit this to be true in point of fact, yet, inasmuch as such precedent is, in modern times, too often resorted to, and relied upon, whenever an occasion presents itself, to mould this constitutional restriction to meet the exigencies of a

given case, in this connection it is proper to advert more at large to the doctrine of contemporaneous or practical construction, and to refer to some of the cases illustrative of the rule we have just laid down, in reference to the question as to what degree of weight such construction of a constitutional or statutory provision is entitled to, in ascertaining the true construction of such provisions.

§ 290. Contemporary practice is of two sorts. The first consists of what was done by the people at the time the law was made, and is resorted to as a means to collect with what view the law was made. The other consists in what was done under the law immediately after it was made, and is resorted to for the purpose of collecting the sense in which the law was understood by those having the fittest opportunity of knowing. Mr. Justice Story, in his treatise on the constitution, says: "It is obvious, however, that contemporary interpretation must be resorted to with much qualification and reserve. The private interpretations of any particular man or body of men, must be manifestly open to much observation. That contemporary construction is properly resorted to, to illustrate and confirm the text, to explain a doubtful phrase, or to expound an obscure clause, and in proportion to the uniformity of that construction, and the known ability and talents of those by whom it is given, is the credit to which it is entitled, it can never abrogate the text, it can never narrow down its true meaning, it can never enlarge its natural boundaries." Other able judges have held, that while great deference is due to a legislative exposition of a constitutional provision, when it is made contemporaneously with the constitution, and may be supposed to result from the same views of policy, and modes of reasoning; yet, even then, it is by no means conclusive. It is much to be doubted whether a single case can be found, where it

has been held, that much stress should be given to a legislative exposition of a constitutional provision, when that provision was one intended to be in restraint of the power of the legislature itself. One case, it is true, contains an intimation to that effect, by a single member of the court of dernier resort in this state, but not in such a way as to give it the force of a judicial determination of that point. To give much weight to a construction by this department of the government of its own powers, and allow its own construction to control, would be a dangerous doctrine, as it would lead to dangerous consequences.

§ 291. Mr. Story says, "That in the exposition of the constitution, where it is a question of power, it should be approached with infinite caution, and be affirmed only on the most persuasive reasons." We will now advert to two leading cases in our own courts illustrative of the rule which governs in the application of the doctrine of contemporaneous exposition. *M'Keen* v. *Delancy's Lessee*,(*a*) decided in 1809, was a case which arose under the act of Pennsylvania of 1715, which required deeds to be acknowledged before a justice of the peace in the county where the land lay; it had been the contemporaneous and uniform practice from 1715 to the date of the deed (1775) to acknowledge deeds before a justice of the supreme court, although the act of 1715 did not authorize such a practice. The Supreme Court of the United States held, as that practice had prevailed for so long a period, it must be considered a correct exposition of the statute, or good evidence of such construction by the judicial tribunals of Pennsylvania. This decision, however, was put upon the ground which the Supreme Court of the United States have uniformly adopted, that in

(*a*) 5 Cranch, 22.

construing the statutes of a state, on which land titles depend, infinite mischief would ensue, if that court were to observe a different rule from that established in the state where the law originated, and that in this case there could be no doubt but that the courts of Pennsylvania considered a justice of the supreme court as within the description of the act. This case establishes this principle, that contemporaneous practice acquiesced in for a great number of years, and acted upon since the time of the passage of an act, is evidence that such act has been thus construed by the judicial tribunals of the state where the statute was passed, and that is all it decides on this point. In *Stuart* v. *Laird*,(*a*) decided in 1803, the question was, whether the judges of the court of the United States had a right to sit as circuit judges, not being appointed as such, the practice always having been for them to do so. It was held, that this was a practical exposition of the constitution, practised and acquiesced in for a period of years, commencing wtih the organization of the judicial system, and hence it was a contemporaneous exposition of the most forcible nature, and that such practical exposition was too strong to be shaken or controlled. The extent of the doctrine to be deduced from all the authorities on this point is, that a practical exposition, in order to be of much force, or entitled to much weight, must be one where there has been an unbroken chain of practice or precedent commensurate with the adoption of the constitution, and acquiesced in and acted upon since that time.

§ 292. If we apply this doctrine to the question under consideration, even if it were admitted that the case of Mr. Holley was a parallel one, (having demonstrated that

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(*a*) 1 Cranch, 299.

all those preceding this, rest on the ground of an increase of public revenue, or the enhancement of public property, or the diminishing of the necessary public expenses,) instead of that unbroken chain of precedent, contemporary with the adoption of the constitution, practised upon and acquiesced in since that time, we have only that one act, originating in 1828; the other acts have all originated since 1837, and have at most been acquiesced in for only a few years, and acted upon but by a few successive legislatures. Is this such an unbroken chain of precedent as this rule contemplates, or such a practical construction of the constitution by the government itself in its various departments, which, within the spirit of this rule, should have much weight or afford any high or satisfactory evidence of the true construction? Should this feeble chain of precedent be deemed adequate to fetter the minds and consciences of legislators who are sworn to support the constitution irrespective of legislative precedent? Much stress has sometimes been laid on what Mr. Justice Story, in his learned commentaries, in discussing constitutional construction, says: "And after all the most unexceptionable course of collateral interpretation, is from the practical exposition of the government itself, in its various departments upon particular questions, discussed and settled upon their own single merits. These approach nearest in their own nature to judicial expositions, and have the same general recommendation that belongs to the latter." It must be borne in mind, that these remarks were not made with reference to a case of constitutional restriction upon legislative power. Even had it been applied to such case, it would not afford much support to the position that much stress is to be laid or much weight given to the construction by but one department of government, when that department is judging of its own powers. To admit this would be but to

permit the particular department restricted to expound away the very restriction imposed; it would be found, that men naturally opposed to all restraint upon their own powers, would not be wanting, who would be willing, by oft repeated practical expositions, to wear out the chain of constitutional restraint, especially in cases where that chain was the only barrier interposed between them and the public treasury or property.

§ 293. If a legislative exposition of a constitutional restriction upon its own power, is to receive so much respect as to be of controlling force, binding and authoritative upon those whose duty it may be to pass upon the constitutionality of a particular legislative act, or is to be received as evidence of a true construction, then the constitutional restriction imposed may, by the mere force of such construction, be rendered ineffectual in restraint of those upon whom it was intended as a check. This would be carrying the doctrine of legal nullification to an extreme unprecedented in the history of any government. If we concede to the legislature this judicial attribute and make its exercise evidence of what the constitution is, then the power restricted has only to pronounce several successive erroneous judgments, and thus elude the restriction by legislative exposition. This would be carrying the doctrine of legislative omnipotence to a greater extent than was ever claimed even by a British parliament. The parliament of England rests its claim to omnipotence, upon the fact that it is unfettered and unrestricted by a written constitution, expressive of the will of its constituents, that it stands in the place of the people, and speaks the language of absolute sovereignty; hence, that its powers must of necessity be transcendental and omnipotent in the scale of political existence, and therefore can mould the constitution at its will: "It is far otherwise under our form of

government. The spirit, genius, and policy of our political institutions, rest upon principles which are at war with the doctrine of legislative omnipotence; ours is a government founded upon an express written compact, reduced to exactitude and certainty, expressive of the sovereign will of the people, fixing the limit and marking the bounds of legislative authority and power. The legislatures instead of being omnipotent, must yield to its force, submit to its restraint, and bow to its authority." This written compact originated in a spirit of distrust of legislative authority, and from a conviction that legislative omnipotence was but another name for despotism. The evidence of that will, rests not in the volition or judgment of those intended to be restricted by its own omnipotent fiat.

§ 294. Under our form of government, the legislature is the creature of the constitution, it owes its existence to that instrument, it derives its power from it; that is, the voice of the people, in their original and unlimited capacity, fixing the limits of legislative power. It is the mandate of the creator, directed to, and obligatory upon the creature; its authority is alone sovereign, absolute, and supreme. If the creature of the constitution, can pass judgment upon its obligations, and its judicial determination of its powers be clothed with the attributes of a judicial exposition, authoritative and of controlling force, then legislative omnipotence in this country would exceed that of the British parliament to an extent at least commensurate with the force of a written constitutional restriction, which it weighs down by the force of its judicial expositions—while the energies of parliament are only directed to the exercise of powers unlimited and uncontrolled, legislative power in this country would go much farther; it would break the fetters the constitution has wrought out, throw off the restraint it

has sought to impose, and annihilate the written will of the people. Parliament never carried its arrogance to such extent; it never, except in days of revolution, nullified the written will of the people it represented by the force of parliamentary exposition: it never trod under foot a written compact: it never sat in judgment in its own cause, and demanded for its decision in such case, respect paramount to *Magna Charta*. The utmost stretch to which legislative exposition can be carried, is, that it may be considered and respected; it may be consulted as an index to other minds; it may be regarded as the embodiment of the views of predecessors, or of one department of the government. But this respect cannot be clothed with the attribute of judicial authority. The evidence of what were the views and opinions of others, can never make those views and opinions evidence that they were right, it can never ripen a wrong opinion into a right one.

§ 295. It is no answer to the views we have taken that a power of judicial exposition, which shall be arbitrary and beyond control, must from necessity be lodged in some department; and hence, that it is as safe to entrust it to legislative exposition, as to expositions made by the judicial tribunals of the land, or that the combined wisdom and judgment of a numerous body of men, is as likely to be correct as that of a single judge, or a limited number of judges acting in a judicial capacity, for the combined wisdom of the people as embodied in the constitution itself, has otherwise settled that question, by lodging the judicial attribute in the hands of another co-ordinate department of the government. A very learned judge, as well as sage of the law, has very justly held, that "To contend that courts of judicature must obey the requisitions of an act of the legislature, when it appears to have been passed in violation of the constitution, would be to contend that the law

was superior to the constitution, and that the judge had no right to look into it, and regard it as the paramount law. It would be to render the power of the agent greater than his principal, and be declaring that the will of only one concurrent and co-ordinate department of the subordinate authorities under the constitution, was absolute over the other department, and competent to control according to its own will and pleasure the whole fabric of the government, and the fundamental law in which it rested. The attempt to impose restraints upon legislative power would be fruitless, if the constitutional provisions were left without any power in the government to guard and enforce them." It is difficult to perceive why it is not just as much the duty of the representative, to bring every act upon which he is to pass to the test of the constitution, and weigh it in that balance, independent of prior legislative exposition, as it is that courts should do so in applying the same test to such act when passed. By a parity of reasoning it would seem to follow, that to contend that a legislative exposition should exert a controlling influence over the mind of the representative when applying such test, would be in effect to contend that such prior exposition is paramount to the constitution, as completely as it would be were judges to adopt that rule in deciding upon such act when passed. Its influence should be no greater in the one case than in the other.

§ 296. The learned commentator on American law has said: "From the mass of powers necessarily vested in the legislature, and the active and sovereign nature of these powers, from the numerous bodies of which the legislature is composed, the popular sympathy which it excites, and its immediate dependence upon the people, by means of periodical elections, it follows that the legislative department of the government will have a decided superiority of influence. It is constantly acting upon all

the great interests of society, and agitating its hopes and fears. It is liable to be constantly swayed by popular *prejudice* and *passion*, and it is difficult to keep it from pressing with injurious weight upon the constitutional rights and privileges of the other departments. While an independent judiciary, venerable by its gravity and its wisdom, and deliberating with entire serenity and moderation, is peculiarly fitted for the exalted duty of expounding the constitution." If it be true, as it undoubtedly is, *that the legislature is liable to be swayed by popular prejudice and passion*, its decisions certainly are liable to be more or less influenced by it; hence, the inference would seem to be, that instead of a legislative exposition being of much weight or exerting a controlling influence, it ought rather to be regarded as very questionable authority, and should be but little relied on, in expounding a constitutional limitation upon legislative power, especially when that power is to be called into exercise to meet the pressing demands of popular clamor for legislative munificence, urged and enforced as such claims are, by the strong and potent energies of numerous constituents, and which too often not only sway and influence the judgment of the representative, but enforce acquiescence in such demand, even at the expense of legislative independence, as well as a sacrifice of the constitution itself. If it be admitted that legislative exposition is to be respected and implicitly followed; if the constitution is thus to be made subordinate to the legislature; if a short and feeble chain of precedent is to be deemed adequate to control the judgment and fetter the conscience of the representative sworn to support the constitution; if that sacred instrument can be thus expounded away; it is to but little purpose, that we live under a government having a written constitution, "which is fixed and certain, expressive of the paramount will of the people, intended as the supreme law of the

land, and to be of a force adequate to fix the limits of legislative authority, and define the boundaries of legislative power, or to prescribe the orbit in which it must move." Such a doctrine subverts the principle that "the constitution is paramount to legislative power, subject to be revoked or altered only by the power that made it—that the life-giving principle, and the death-giving stroke must proceed from the same hand." For, then, instead of "the constitution fixing the limits of legislative authority, and prescribing the circle in which it must move," the legislature become to the constitution the sun, around which it must revolve, and upon which it must be dependent for its existence. Such a doctrine strikes a death blow to the long cherished opinion "that the constitution of a state is stable and permanent, not to be worked upon by the temper of the times, not to rise and fall with the tide of events, notwithstanding the competition of opposing interests, or the violence of contending parties." Instead of its "remaining firm and immovable as a mountain amid the strife of storms, or a rock in the ocean amid the raging of waves," it becomes a frail bark, which may be rocked by the surges of political strife—be tossed and shattered by every breeze which ambition or avarice may excite—and it will become a total wreck, whenever it shall have encountered three or four successive mutilations upon the quick-sands of legislative precedent.

§ 297. In some instances it has been urged, that acts granting public property or releasing a debt due to the state were conditional, and hence not within this two-third clause. This, we think, can make no difference. A moment's consideration will show the danger as well as the absurdity of permitting such a circumstance to be regarded as sufficient to elude this constitutional restriction on legislative power. Such a principle, if admitted, would render this clause of the constitution a

dead letter. It would destroy its efficacy, and violate a well settled rule of construction, that "a constitutional provision, intended to prevent or remedy an evil, should receive such a construction as to extend to all cases in which that evil may be found." A distinguished constitutional lawyer has said, that "The object of this provision in the constitution was to guard against too ready and too lavish disbursement of public money, or appropriations of public property, for the advancement of local or private interests, without a correspondent benefit to the state in its politic capacity; hence it is the duty of the representatives of the public, whether in a legislative or other capacity, to give such a construction to the constitution as will most effectually save the rights and public property of those who adopted it, whenever it can be done without compromitting other and more valuable interests." Once admit the principle that the legislature may, by a majority vote, make an effectual grant of the public property for local or private purposes, provided such grant shall be conditional, then it might donate the entire property of the public upon an individual, upon the condition that he should give his wife or child one dollar, or any other condition equally absurd. Or if you limit the condition to a right of repurchasing the subject of the grant, on terms to be prescribed by the legislature, then the majority of the legislature are made the arbiters of those terms, and are vested with a power of prescription, which may be exercised in such a manner as to render a compliance with those terms and conditions, on the part of the state, so onerous and oppressive as to require a sacrifice greater than the value of the thing which was the subject of the grant; and thus effect the object, but elude the constitution, or render it nugatory. It would admit the application of the dagger to the heart of the constitution, provided the legislative hand could be concealed by this thin disguise, while it inflicted the

death blow. Such a principle would permit the majority of the legislature to fritter away the entire public property, which it was the object and design of this clause to protect. It would invite legislative peculation upon that property, at each annual session, until it should be entirely squandered, or until the inventive powers of men, prompted by local interest, or excited by the dictates of avarice, or influenced by the still more reprehensible spirit of demagogueism, shall cease to be employed, as they ever have been, in devising the means, and inventing conditions, by which to elude the letter and subvert the spirit of this sacred instrument, or quite destroying its force and effect. So, too, if the fact that a grant of the public property, by a majority vote, for a local or a private purpose, is to take effect at a future day, should be considered as sufficient to take such a grant out of this constitutional limitation upon legislative power, then the legislature have only to pass such an act, without specifying the time it is to take effect, and this object is accomplished, under the general statute, which provides in such case, it shall take effect in twenty days.

§ 298. The next question arising under this clause of the constitution, to wit: what, within the meaning of this clause, is "a bill creating, continuing, altering, or renewing a body politic or corporate," has frequently been considered by our judicial tribunals. A distinction was, at one time, taken, between a mere municipal corporation and other corporations. In the first case, in our courts, where this question arose,(*a*) it was held, that this provision did not apply to public corporations, but solely to private corporations, such as banking institutions and the like. That laws affecting public corporations,

(*a*) *The People* v. *Morris*, 13 Wend. 325.

such as cities and villages, might be passed by a majority vote. It was, however, in that case, conceded, that a strict interpretation would include the former class. The same doctrine was reiterated in a subsequent case.(*a*) Chancellor Walworth, in subsequent cases, entertained the same view of this point.(*b*) The decision on this point in the last cited cases was based upon the ground, that public corporations were not within the mischiefs the constitution was intended to guard against. That it was aimed solely at a multiplicity of private corporations. But this doctrine in the court of dernier resort was ultimately overturned in the case of *The People* v. *Purdy*.(*c*)

§ 299. In that case it was definitely settled, that this clause includes all corporations, properly so called, whether public or private. The decision in that court was placed on the ground, that the terms were sufficiently comprehensive to include all corporations, and were explicit and unambiguous. The plain and comprehensive language did not warrant the court in confining it to private corporations. That if it had been the intention of the framers of the constitution to have excluded public corporations from the operation of this section, and to leave them to be controlled at the pleasure of a bare majority of each house, they should have said so in express terms, and they evidently would not have used the words "every bill," applicable to all corporations. When the words were thus plain and clear, and the sense distinct and perfect arising on them, no other sources of interpretation should be resorted to. That the constitution made no distinction, in terms, between public and private corporations. If it was the intention of this

(*a*) *The People ex rel. Lynch* v. *The Mayor, &c.*, 25 Wend. 680.
(*b*) *Warner* v. *Beers*, 23 Wend. 126. *The People* v. *Purdy*, 4 Hill, 391.
(*c*) 4 Hill, 391.

clause to prevent a multiplicity of banks or monied corporations, why were they not specifically enumerated, and an exception made exempting public corporations from the general provisions. The evils to be apprehended from the alteration of a public corporation were far greater than any which would be likely to flow from altering a mere private corporation; for the one would affect only a few individuals; the other, the whole community. Hence, the inhabitants of cities and towns had been careful to retain, in all their charters, the recitals of their ancient liberties and free customs; because they knew and understood the operation of these upon their interest and happiness. Hence it had been the policy in territorial cessions, and on conquest, to retain the ancient usages of the people. There was much more reason for applying the two-third clause of the constitution to public rather than private corporations, in order to shield the former against sudden and arbitrary encroachments upon their ancient customs. Nothing appeared more inconsistent, than that the framers of the constitution intended to allow the chartered rights of a great community, consisting of more than three hundred thousand souls, to be altered by a bare majority vote, while at the same time they required the assent of two-thirds of the members elected to each branch of the legislature to amend or alter the incorporation of a turnpike or toll bridge.

§ 300. That the people, in the adoption of the constitution, must be understood to have used the words of the text in their reasonable interpretation, and not according to the private understanding of any particular man. Where the words were clear, and the sense distinct and perfect, arising on them, there was generally no necessity to have recourse to other means of interpretation. That recourse to other means of interpretation was only warranted where there was some ambiguity in

the language. That adopting these rules of construction and applying them to this clause, no doubt remained as to its meaning. The words were so plain and their meaning so clear and obvious, there had been no attempt to explain them away. If the words "altering or renewing any body politic or corporate," might be construed to mean one kind of corporation only, to wit, *private corporations*, might it not be said, that another distinction may be made, and it be insisted that the words did not apply to a sole corporation, and then another that they did not relate to a lay, but only to spiritual corporations, and then refining still more in the love of spiritualization, explain "any body" to mean nobody. Such a construction would be contrary to what the constitution plainly imports. The language was, "every bill," continuing, altering, &c., *any* body politic. Lexicographers had defined the word "every," to mean "each one of all." Johnson had given the example of its definition, "All the congregation are holy, every one of them;" and he had also defined the word "any" to mean "every," and had said, "It is in all its senses applied indifferently to persons and things." That the construction which had been contended for would make the words "every bill, altering or renewing any body politic or corporate," to mean some bills and some corporations, instead of every bill and all corporations, and that too, where the words used were not dubious or couched in any ambiguous terms.

§ 301. The decision was also placed on the ground, that the debates in the convention which framed the constitution showed that this subject was distinctly brought before that body, in course of the discussion had upon this section, and was formally passed upon. On referring to Carter and Stone's Debates in convention it would be seen, that when the report of the committee, containing this clause, came up for consideration, not

only was it suggested that this provision would embrace public as well as private corporations, but a proposition was actually submitted to amend, by adding after the word "any" the words "bank or monied institution," thus confining its operation to this particular class of corporations. It was then argued that the section as it then stood, would require two-thirds of the members of each branch of the legislature to incorporate a village bridge or turnpike. But it was answered, that two-thirds would never be wanting to incorporate a village or a turnpike; and the proposed amendment was thereupon withdrawn. Thus showing clearly, that the convention, while they were anxious to throw restrictions around the increase of monied corporations, were at the same time desirous to guard and protect all incorporated institutions from any alteration of their charter of rights, except in cases where those alterations were of so clear and palpable a character, as to satisfy the minds of two-thirds of the members elected to the legislature that such alteration should be made.

§ 302. It has been decided by the court of dernier resort in the state of New York, that the act of 1838, entitled "An act to authorize the business of banking," was a valid and constitutional act, although it did not receive the assent of two-thirds of the members elected to each branch of the legislature. That associations organized under this act, and in conformity to its provisions, were not corporations within the spirit and meaning of the constitution.(*a*) The decision in this case was placed on as many different grounds as there were different minds participating in the expression of an opinion. The president of the senate held, that corporations exist either by express grant or by implication. That by this act

(*a*) *Warner* v. *Beers, President*, 23 Wend. 103.

corporations were not expressly created or authorized. The associations formed under it were not corporations, by implication. An association of men would not be deemed a corporation by implication, except where corporate authority was necessary to the exercise of beneficial powers expressly granted, or for the protection of important interests, or the execution of important trusts; nor would such associations be deemed to possess corporate powers, unless such powers were solicited by the donees of the power. These associations were not corporations by implication, for the following reasons: There was no necessity that they should possess corporate powers to carry into effect the objects for which they were authorized. Such powers were not solicited by the public in their appeals to the legislature for this law. The legislature did not intend to create or authorize corporations, nor had it done so by conferring the powers and privileges which those associations were authorized to use and enjoy. At common law most of those privileges were claimed and had been long exercised by private associations, copartnerships, and joint stock companies. But if these associations were deemed to be corporations, the law authorizing them was not within the mischiefs intended to be remedied, and therefore not within this inhibitory clause of the constitution. The evils intended to be guarded against were the exclusive character and undue multiplication of corporations, possessing and exercising banking powers, which, by means of the restraining acts, had grown into monopolies. The effect of this act was to repeal *pro tanto* the restraining act, and thus restore to the citizens generally a common law right of which they had been deprived. The act, instead of violating this provision of the constitution, came in aid of it, and was therefore a constitutional act, although it did not receive the assent of two-

thirds of the members elected to each branch of the legislature.

§ 303. The Chancellor placed his decision on the ground that the constitution of a state, like an act of the legislature, must be construed according to its spirit and intent; taking into view the evils intended to be remedied, and the danger sought to be guarded against. This prohibitory clause in the constitution was intended to guard against the increase of joint-stock corporations, either for banking, or for other purposes of trade or profit, the charters of which conferred exclusive privileges, and which when obtained were beyond the reach of general legislation, so that they could neither be modified or repealed. This provision was not intended to restrict the powers of the legislature so as to prevent the granting of an equal right or privilege to all the inhabitants of the state, or to so many of them as should choose to associate together for the purposes of trade, or other lawful business, during the continuance of the act granting the privilege, provided such privilege was at all times subject to the control of general legislation. He conceded that these associations had the right in their collective capacity, to hold property in common, and in a manner in which individuals were not permitted to hold it, and transmit the same to others by an artificial and continued succession, and possessed powers which were distinguished characteristics of a corporation. Had the act guarantied the continuance of such powers and privileges, so that the same could not be taken away by a simple repeal of the law, or be modified by general legislation, the act would have been within this clause of the constitution. But that these powers, privileges and immunities, could only endure while the act remained in force, and might be modified or repealed by the legislature by a vote of less than two-thirds; and

hence, the act was not within the spirit or intent of this restrictive clause in the constitution.

§ 304. Senator Verplanck held, that the associations authorized by this act, were partnerships or joint-stock companies, and not corporations. This provision was intended to guard against the undue increase of institutions enjoying exclusive privileges, and operating as monopolies. The act in question, instead of conflicting with the constitution, came directly in aid, by opening the business of banking to all who chose to engage in it, upon complying with the requisitions of the legislature.(*a*) Thus, it will be perceived, that this important question has been definitely settled in the court of dernier resort.

§ 305. Notwithstanding the decision by that court thus explicit on this question, the former supreme court of this state uniformly adhered, as well before as since the above named decision, to the doctrine that associations created by or organized under the act of 1838, are corporations.(*b*) The court for the correction of errors has itself decided(*c*) that associations formed under this law, are *corporations* within the statute relative to taxation. Hence, in the same court, we have presented the anomaly of deciding that they are *not* corporations within the spirit of this clause in the constitution, which it conceded is directed at the creation of *monied corporations*, and that they *are* corporations, and *monied corporations* too, within statutes aimed at such kind of corpo-

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(*a*) See also, *Gifford* v. *Livingston*, 2 Denio, 380.

(*b*) *Thomas* v. *Dakin*, 22 Wend. R. 1; *Delafield* v. *Kinney*, 24 Wend. R. 345; *In the matter of the Danville Bank*, 6 Hill's R. 370; *The People* v. *Assessors of Watertown*, 1 Hill, 616; *De Bow* v. *The People*, 1 Denio's R. 9; *Willoughby* v. *Comstock*, 3 Hill, 389; *The People* v. *The Supervisors of Niagara*, 4 Hill, 20.

(*c*) *The Board of Supervisors of Niagara* v. *The People, ex rel. McMartin*, 7 Hill, 504.

rations, and that too accompanied with a concession that the constitution was intended to apply to that kind of corporations. We are aware that the Chancellor, in the case of *Gifford* v. *Livingston*,(*a*) undertook to reconcile the manifest inconsistency of these decisions. In regard to the decision of *The Supervisors of Niagara* v. *The People*,(*b*) he said, "That decision it is true, does declare them to be corporations, but the actual judgment given by the supreme court, or by this court in that case, can only be sustained upon the supposition that such associations were legal and constitutional corporations, so as to be taxable as corporations under the general tax law. For, if they were merely illegal and unconstitutional associations of individuals, their property would not have been taxable as corporate stock at the place where the office of the association was located, and by the corporate name, but each individual stockholder would be taxable for the actual value of his interest in such stock, so far as that interest consisted of personal estate, according to the provisions of the general law. The mandamus asked for in that case was, to compel the supervisors of the county of Niagara to place the name of one of these associations upon the assessment roll, and tax it as a corporation; and the supreme court directed a peremptory mandamus accordingly. That judgment was brought to this court upon a writ of error, and was affirmed. Now it is evident, that if the general banking law was unconstitutional, an association attempted to be created under it, would have no legal existence as a corporation, and could not therefore be taxed as such. In the language of one of our most able and distinguished judges, 'If the general bank law was

(*a*) 2 Denio, 388. (*b*) 7 Hill, 501.

not a constitutional exercise of power on the part of the legislature, it follows that there was no such legal being as the Bank of Lockport to be taxed.' In justice to the supreme court, it is however proper to say, I have been informed by the Chief Justice of that court, that the counsel in the Lockport case did not advert to the fact that the banking association could not be taxable as a corporation, if the general banking law was an unconstitutional act." With due deference we submit, whether these observations of the learned Chancellor obviate in the least, the charge of inconsistency urged against that court, for pronouncing what we conceive to be manifestly inconsistent and irreconcilable decisions upon this question? One thing is certain, these associations are the creatures of the statute, and as such, if they are for any purposes a corporation, it is because the statute makes them such; for no corporation under our form of government can, or does exist, independent of some *statutory creation;* hence, if the statute created them, or authorized their creation, it did create or authorize their creation as *corporations*, otherwise they could not be taxed as such. The decision, that as corporations they were taxable, did in fact, of necessity decide that they were *corporations*—nay more, that they were *monied corporations;* or in other words, that they were just what the constitution had declared should not be created, except by the assent of two-thirds of all the members elected to each branch of the legislature. Nor can any one doubt that they would unquestionably have been declared such by that court, had it not acted under the influence of extraneous matters affecting, to a great extent, the commercial community of one of the greatest and most important commercial states of the United Confederacy. We fully concur in the view of this question expressed by Bronson, Chief Justice, in the case of *De Bow* v. *The*

People,(*a*) that the court decided that these banks were corporations of the particular kind or species mentioned in the law, to wit: "*Monied or Stock Corporations* deriving an income or profit from their capital, or otherwise," and that such a decision necessarily affirmed that they were corporations; and that the constitution is not confined to any particular kind or species of corporations, but includes the whole genus. We also fully concur in the clear, sound, and forcible reasoning of the Chief Justice in the case last cited, as well as in the case of *The People* v. *The Assessors of Watertown*.(*b*) It is to be regretted that this constitutional restriction has been forced to yield all its vitality under the pressure of the public exigencies, and that in defiance of its plain and obvious import, that these institutions have been ingrafted upon our statute books by a mere majority vote, but it is now presumed that this question will never again come under review; and if it should, there is but little hope that it would ever receive a different judicial determination.

§ 306. In the case of *The People* v. *Purdy*,(*c*) the majority of the supreme court held, that an act which annulled the power conferred upon the Aldermen of the city of New York by the charter of 1730, to officiate as judges in the court of general sessions, might be passed as a majority bill. Mr. Justice Cowen in that case held, that the act did not import an interference with any right of a strictly corporate character, and was not for that reason within this clause of the constitution. Chief Justice Nelson concurred with him on the main question, but placed his decision upon the ground that this clause did not relate to municipal corporations. Mr. Justice Bronson dissented, and the decision of the majority of

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(*a*) 1 Denio, 16.
(*b*) 1 Hill, 616.
(*c*) 4 Hill, 384.

the court in this case was reversed by the court for the correction of errors; and the bill was held to be a two-third bill within this clause of the constitution, and that it could not be constitutionally passed by a majority vote —that an act excluding aldermen of the city of New York from sitting as judges of the court of general sessions was one altering the charter of the city.

§ 307. The question has frequently arisen under this clause, whether the legislature has the constitutional power although two-thirds might assent, to provide by a general law for the creation of an indefinite number of corporations by a single act. This question came under consideration in the supreme court of this state, in the case of *Thomas* v. *Dakin*.(*a*) The question arose in that case under the general banking law of this state; but the members of that court were not unanimous in opinion on this point. In was in that case, on the one hand, urged that according to the true intent and meaning of this clause, each corporation thereafter to be created must receive the direct assent of two-thirds of the members elected to each branch of the legislature. On the other hand it was insisted, that this provision was fairly complied with, when the assent of two-thirds was given to a general statute establishing a system for the admission of voluntary associations to corporate privileges; in other words, when such assent was indirectly given to the creation of each. Chief Justice Nelson admitted, that we were to regard this clause as intended to check the undue multiplication of these bodies; that it was quite clear that the former construction would most effectually attain the object, as it secured a perpetual restraint upon their creation, both as it respects the deliberation and judgment to be bestowed, as well as

(*a*) 22 Wend. 76.

to the assent to be given to each particular application. A general law when once enacted, put an end to all further check upon the legislature, but that the latter interpretation gave full scope to this clause in respect to all the legislation essential to the creation of such bodies as now could claim an existence except such as were passed in obedience to its injunctions. The material difference between the two constructions consisted mainly in the mode of applying the restriction to the action of the legislature; the one making it bear directly upon the grant of privileges, the other only through an established system of law devised for the purpose. The words descriptive of the nature and character of the bill, and which distinguished it as falling within the restriction, only imported one creating any body politic or corporate. How, or in what mode, the bill should create them; what should be its particular provisions; whether it must create directly, or might do it indirectly, was not prescribed; and of course must depend upon the construction to be given to it. One thing it secured in terms, that however the bill might be passed, if it created a corporation, it could properly only be passed by two-thirds. Hence, it might be argued with considerable effect, that the framers of the constitution did not intend to restrict the discretion of the legislature in respect to the form and provisions of the bill, its particular arrangements and details, whether it might or might not embody provisions creating one or more corporations at the same time, or provide for their creation at will, for specified objects, upon certain stipulations and conditions to be first complied with; but that they intended simply to inhibit the passage of whatever bill might be devised creating, directly or indirectly, these institutions. He was of the opinion they might, by a two-third vote, pass a bill creating an indefinite number of corporations. Mr. Justice Cowen was also of the opinion, that the le-

gislature had the constitutional power to authorize the creation of an indefinite number of corporations, whether of one sort or another, by a two-third vote. But Mr. Justice Bronson said " he could not concur in the opinion that the legislature had the constitutional power, although two-thirds may assent, by a general law for the creation of an indefinite number of corporations, at the pleasure of any persons who may associate for that purpose." The ultimate decision in this cause was placed upon other grounds, although the court were united in the opinion that these associations were corporations; and the majority of the court were of the opinion that a multiplicity of corporations might be created by a general law.

§ 308. In the case of *Beears* v. *Warner*,(a) in the court for the correction of errors, the Chancellor held that an act of the legislature authorizing an indefinite number of corporations to be created, upon compliance with certain conditions, was a valid and constitutional act, if passed with the assent of two-thirds of all the members elected to each branch of the legislature. Such also was the opinion expressed by the president of the senate. He held, that if the act did come within this provision in the constitution, it might still have been passed by a two-third vote. His reasons were—that previous to the adoption of the constitution, the legislature possessed and exercised the power of passing such laws. The object of the restrictive clause of the constitution, even if applicable to this branch of legislation, was not to prohibit altogether the exercise of this power, or prevent entirely the passage of such acts, but merely to change the vote by which such acts should be passed. The power of the legislature to pass such an act remained the same as before: the manner only of doing it

(a) 23 Wend. 105.

was modified by this new provision in the constitution; it now requiring for their passage, instead of a vote of a simple majority of a quorum, the assent of two-thirds of all the members elected to each branch of the legislature. On the other hand, Senator Root held, that the law would have been unconstitutional, even had it received the assent of two-thirds of the members elected to each branch of the legislature. That the constitution required such assent to the creation of each and every body politic or corporate. An indefinite number of corporations, could not be authorized or created under a general act of the legislature. This cause was however decided on the ground that this act was constitutionally passed, although it did not receive a two-third vote; and also on the ground that the associations it authorized were not corporations within the spirit and meaning of the constitution.

§ 309. Assuming it to be true, that these associations are not corporations, the decision in that cause, placing it on that ground, did not necessarily require a judicial determination of the precise question under consideration, such would seem to be the inference from the case itself. We are aware, however, that in the case of *Gifford* v. *Livingston*,(*a*) the chancellor undertakes to show, that in the case of *Warner* v. *Beers*, the court of dernier resort intended to and did necessarily pass upon this precise point; on that question, however, there seems to have been conflict of opinion even among the members of that court. Taking all the various opinions which have been expressed on this question in the state of New York, perhaps it may be said that the scale preponderates in favor of the doctrine that the legislature may, by a single bill, create an indefinite number of cor-

(*a*) 2 Denio, 384.

porations, by a two-third vote, and should this question ever again arise the probabilities are, that this view of this clause of our constitution will receive a judicial sanction, in a decisive and authoritative manner.

§ 310. Section 2, of art. 12 of the constitution of the state of Michigan, contains this provision: "The legislature shall pass no act of incorporation, unless with the assent of at least two-thirds of each house." In the case of *Falconer et al.* v. *Campbell*,(*a*) the question arose, whether the legislature could create several distinct corporations by the same act. It was in that case held, that the legislature having the power to establish more than one incorporation in the same act, might establish many, or an indefinite number, in one act; whether the act was limited or indefinite did not render it unconstitutional. Mr. Justice McLean held, it could not be said that the law in question (a general banking law,) violated any express provision of the constitution. The extent of the restriction was, that no act of incorporation could be passed except by at least a majority of two-thirds of each branch of the legislature. This did not limit the number of corporations which should be created in one act. The only express restriction on the subject was, that the act must be passed by a majority of two-thirds, and that if the legislative power was to be restricted beyond this, it must be done by construction, although there was a wide difference between the policy of a general and a special law, yet that was not a question for judicial cognizance. The question was, whether there was such a difference in principle, as to make the one constitutional and the other unconstitutional. As to the power of the legislature, it was unquestionable, whether the law established one or fifty banking insti-

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(*a*) 2 McLean's R. 200.

tutions. The same power which might establish one, under the constitution, might establish fifty. The only difference between a general and a special act was, in one, the number of corporations was limited, whilst under the other, they were indefinite. The legislature might determine the number, if they might do this, they might, by a two-third vote, establish voluntary associations, without limiting their number. If a law created ten, it acted as directly and distinctly upon each association as if it had been the only one created by it. In the passing of the law, the legislature exercised the same scrutiny as if they were about to incorporate one bank. If they might create two they might create more than two, or any indefinite number. In the general law there was no disregard of the restraints of the constitution. Having the power to establish more than one corporation in the same act, they might establish many, or an indefinite number. The number, whether indefinite or limited, did not render the law repugnant to the constitution. Thus, it will be perceived, that in Michigan, this precise question has received a judicial determination in favor of the position, that an indefinite number of corporations may be created by a single act, provided such act is passed by a two-third vote. It will be perceived, however, that the language of the constitution of Michigan is not as specific and definite as is that of the constitution of New York. The one requires the assent of two-thirds to an act of incorporation, it is directed to an attribute of legislative power and not to the manner of its exercise; the other, the like assent to every bill creating, continuing, &c., any body politic or corporate, that is, to every act in which this attribute is brought into exercise. Were this an original question, in the absence of any adjudication, we should not hesitate to concur in the views expressed by Senator Root.

§ 311. The next qualified restriction upon legislative power we shall notice, is that which relates to taking private property for public use. The respective clauses in the respective state constitutions relating to this subject will be found in chapter six, and to which reference may for that purpose be had. It will be seen that in some instances, this right of eminent domain by express provisions can only be exercised when the public exigencies require it. Such is the provision in the constitutions of Maine and Massachusetts. In one instance, that of New Hampshire, there is no clause containing any express provision that when private property is taken for public use just compensation shall be made. It has, however, been held, in that state, whenever this power is exercised, a just compensatiom must be made. Natural justice speaks on this subject when the constitution is silent.(*a*)

§ 312. In the consideration of this subject, it should be observed at the outset, that we understand that the right of taking private property for public use is incident to the sovereignty of every government. By the common law the right of eminent domain has ever been held as a high prerogative of sovereignty, to be exercised only for the public use, and only under such circumstances as preclude the attainment of that benefit except by its exercise. The constitution, as we understand it, has not altered this rule of common law, or disposed of this natural inherent incident of sovereignty.

§ 313. We have shown in chapter eight, in doing so the obligation of a contract was not impaired, for the reason that all persons hold their property subject to this requisition for public use, or right of eminent domain in the state, for public purposes. The property of the citi-

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(*a*) *Bristol* v. *Newchester*, 3 N. H. R. 534.

zen is only protected from arbitrary seizure, not when it is taken or appropriated by public right for public use. This principle has been recognized by oft repeated judicial decisions.(*a*) It has been said of the necessity or expediency of the exercise of this right of eminent domain the government must, in all cases, be the judge, but the obligation to make just compensation for the property taken by it is concomitant with the right.(*b*)

§ 314. The necessity for exercising this right of eminent domain is manifest, for were it denied, the will or caprice of an individual might often defeat the most useful and extensive enterprises. Hence it is, that yielding to the public exigencies, the law authorizes on the one hand, a species of forced sale to satisfy the pressing necessities of the public, and on the other hand, giving to the owner an equivalent therefor. Whenever the legislature authorizes the taking of private property, the compensation therefor must be settled by stipulation between the legislature and the proprietor, by commissioners mutually elected by the parties, or by the intervention of a jury.(*c*) In one of the cases cited the act providing for compensation directed the claimants should present their claims to a board of property, who were to judge of the validity of the claim, and ascertain through the medium of commissioners to be appointed by the legislature, the quality and value of the land, and to judge of the quantity of the vacant land to be granted

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(*a*) *Bonaparte* v. *The Camden and Amboy Rail Road Co.*, 1 Baldw. C. C. R. 221.

(*b*) See *Cooper* v. *Williams*, 7 Greenl. R. 273. *McMaster* v. *The Commonwealth*, 3 Watts' R. 294. *Henry* v. *Underwood*, 1 Dana, 247. *O'Hara* v. *Lexington Rail Road Co.*, 1 Dana, 232. *Perry* v. *Wilson*, 7 Mass. R. 395. *Harding* v. *Goodlet*, 3 Yerger R. 41.

(*c*) *Van Horne's Lessees* v. *Dorrance*, 2 Dallas R. 313. *Armstrong* v. *Jackson*, 1 Blackf. R. 374.

as an equivalent. That act was held not a constitutional one.

§ 315. In *Van Horne's Lessees* v. *Dorrance* it was held, that no just compensation could be made except in money. Money was the common standard, by comparison with which the value of any thing might be ascertained. It was not only a sign which represented the respective value of commodities; but it was an universal medium, easily portable, liable to little variation, and readily exchanged for any kind of property. Compensation was a recompense in value, a *quid pro quo*, and must be in money; although land or any thing else might be a compensation, it must be at the election of the party. It could not be forced upon him. The decision in that case was a *nisi prius* decision, upon which a writ of error was taken, but never prosecuted, in consequence of the repeal of the statute which gave rise to the controversy. The accuracy of this decision has, in several instances, been questioned; but it has not, as we are aware, ever been expressly overruled.

§ 316. Rogers, J., in the case of *McMaster* v. *The Commonwealth*,(*a*) commenting on the case of *Van Horne's Lessees* v. *Dorrance*, remarks: "It is true that there is a primary convenience in money as a medium of commercial exchange, but I do not feel the force of reasoning by which the court deduce a conclusion from this, against the exercising of a constitutional power in the legislature. It is an inference drawn from its supposed advantages, but certainly not an express requirement of the constitution, which in general terms declares, that no man's property shall be taken or applied to public use without the consent of his representatives, and without just compensation being made. As the legisla-

(*a*) 3 Watts' R. 296.

ture had the undoubted right to determine when the public interest requires the assumption of private property, so, it seems to me to be the better construction of the constitution, that it shall rest in their wisdom to determine the nature and kind of compensation to be made, and also to point out the tribunal by whom the amount may be ascertained. Experience has shown, that the commonwealth, rather than individuals, have most reason to complain of the assessment of damages when lands have been appropriated to public use." Huston, J., in *Satterlee* v. *Matthewson*,(*a*) said, the accuracy of the decision in the case of *Van Horne's Lessees* v. *Dorrance*, had been questioned. "However this may be, yet there is one thing certain, that if it be considered a correct exposition of the constitution, the legislature have violated the provisions in question in more instances than one."

§ 317. In the case last cited, as well as several others which have come to our notice, it has been supposed that acts of the legislature providing for the assessment of damages to the owner for property taken for public use, which contain a provision, that in making such assessments an estimate shall be made of the benefits to accrue from such public use to the owner, and directing the amount of such estimated benefit to be deducted from the value of the property taken, were in direct conflict with the principle laid down in *Van Horne's Lessees* v. *Dorrance*. It was upon such an assumption Mr. Justice Huston made the remark above quoted. But we cannot perceive that there is any such conflict in reality. The just compensation the constitution demands shall be given to the owner, it seems to us, is fully provided for within the spirit of the constitution, when the party has a full equi-

(*a*) 16 Serg. & Rawle, 179.

valent for the property taken; that equivalent must, and in justice ought to be ascertained, by estimating the actual damage the party sustains by the loss of the property taken. That damage is the value of the property, less the actual amount of benefit accruing to the residue of the property of the same individual, by reason of the use made of that taken. The benefit is in part an equivalent for the property taken, and as such equivalent, in the language of the constitution it is, to that extent, a "just compensation." Such acts of legislation have been for a long period acquiesced in, and have received a judicial sanction. In most turnpike acts, in the estimation of damages, the viewers are required to take into consideration the advantages accruing from the road, as well as the injury done to the owner of the land taken. The same principle has been engrafted into the canal system of several states, and has also been incorporated into many acts in reference to the opening or widening public streets in cities and villages. In the case of *Livingston* v. *The Mayor, &c., of N. Y.*,(*a*) such a provision received a judicial sanction. The court for the correction of errors in that case held, that the benefit accruing to a person whose land was taken for a street, the increased value of adjacent property belonging to him might be set off against the loss or damage sustained by him by the taking of his property for a street, and if equal to the damage or loss, it was a just compensation to the extent of such benefit for the property taken. In some instances such acts go still farther, and direct an assessment of benefit to lots owned by persons whose land is not taken for public use, for the advantage of those who may be injured by the improvement; such acts have also received a judicial sanction.(*b*)

(*a*) 8 Wend. 85.

(*b*) *McMaster* v. *The Commonwealth*, 3 Watts' R. 296.

§ 318. We very much doubt the accuracy of, nor can we yield our assent to the doctrine laid down by Mr. Justice Rogers, in the case of *McMaster* v. *The Commonwealth*, above cited, that "it should rest in the wisdom of the legislature to determine the nature and kind of compensation to be made." It seems to us that such a doctrine ought not to be tolerated for a moment; it would, if sanctioned, authorize if not lead to an abuse which would, in effect, virtually remove all the protection it was the design of the constitution to throw around private property, as a shield against legislative aggression. If the legislature may, at its discretion, determine the nature and kind of compensation, if superadded to this such determination is to be conclusive upon the citizen, and that without his consent, the legislature, in the exercise of such a discretion, might determine as an equivalent whatever thing it might choose to designate, and force upon the citizen that which to him would be utterly worthless, nay more, that which would prove to be a curse, instead of just compensation. We cannot resist the conclusion in our mind, that the extent of the actual damages sustained, calculated upon the principle above stated by us, should be compensated by an actual payment of an equivalent in that which, by the law of the land, would be deemed a lawful tender in the payment of any other pecuniary demand. The moment private property is taken for public use the obligation on the part of the government to compensate arises, that obligation becomes, in fact, a debt, and, as such, should be paid in money. Indeed, state governments are expressly inhibited from making any thing but gold and silver coin a lawful tender for a debt. This inhibition ought to be construed as extending to such a case as this, for compensation due is in fact a debt.

§ 319. Mr. Justice Patterson, after stating the rule laid down by him in *Van Horne's Lessees* v. *Dorrance*,

uses the following clear and forcible argument: "It is contended, that the legislature may judge of the necessity of interposing their despotic authority; that it is a right of necessity upon which no other power in government can decide; that no civil institution is perfect; and that cases will occur in which private property must yield to urgent calls of public utility, or general danger. Be it so; but then it must be upon complete indemnification to the individual. Agreed. But who shall judge of this? Did there exist a state necessity, that the legislature, or persons solely appointed by them, must admeasure the compensation or value of the land seized or taken, and the validity of the title thereto? Did a third state necessity exist, that the proprietor must take lands by way of equivalent for his land? And did a fourth state necessity exist, that the value of this land equivalent must be adjusted by the board of property without the consent of the party, or the intervention of a jury? Alas! how necessity begets necessities. They rise upon each other and become endless. The proprietor stands afar off, a solitary and unprotected member of the community, and is stripped of his property without his consent, without a hearing, without notice; the value of that property judged upon without his participation, or the intervention of a jury, and the equivalent therefor in lands ascertained in the same way. If this be the legislation of a republican government, in which the preservation of property is made sacred by the constitution, I ask wherein does it differ from the mandate of an *Asiatic Prince?*"

§ 320. Under the constitution of New Hampshire an express provision is made, that "In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has been heretofore used and practised, the parties shall have a right to a trial by a jury." It has however been held, where

an act of the legislature took the property of a corporation for public use, in the exercise of this power of eminent domain, it was not necessary that the act should provide for a trial by jury to ascertain the damages occasioned by the laying out of a highway.(*a*) This decision was placed upon the ground that by a long course of legislation the damages occasioned by the laying out of highways had been assessed by the court or a committee, and no provision was found for the intervention of a jury in cases of that character. It had therefore been otherwise used and practised for nearly a century and a half before the adoption of the constitution, and a similar practice had prevailed since; hence, this case was not only within the express language of the exception, but there was abundant evidence that it had been within the view of the framers of the constitution.

§ 321. Until just indemnity is afforded to the party, the power of taking his property cannot be lawfully exercised. So strictly is this rule adhered to, that if an attempt is made under a statute to take such property without such an indemnity, a court of chancery will interpose by way of injunction.(*b*) Although it is true that the legislature may appropriate the lands of another to public uses without his assent, provided a reasonable compensation be made to him therefor; but without such compensation such an appropriation would be unconstitutional and void.(*c*)

§ 322. In *Rogers* v. *Bradshaw*,(*d*) it was held, that where private property was taken for public use, it was

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(*a*) *Backus* v. *Lebanon*, 11 N. H. R. 19.

(*b*) *Gardner* v. *Trustees of Newburgh*, 2 John. Ch. R. 162.

(*c*) *Perry* v. *Wilson*, 7 Mass. R. 393. *Stephens* v. *Middlesex Canal*, 12 id. 466. *Thatcher* v. *Dartmouth Bridge*, 18 Pick. R. 501.

(*d*) 20 Johns. R. 735.

not necessary the amount of the compensation should be actually ascertained and paid before such property was taken and appropriated to the public use. It was sufficient if a certain and adequate remedy was provided by which the individual could obtain such compensation without any unreasonable delay. In a subsequent case the above rule was qualified by Chancellor Kent. The doctrine was countenanced by him, that it was not even necessary a remedy for obtaining compensation should be provided.(*a*) Chancellor Walworth, however, has refused to sanction the reasoning of Chancellor Kent in the case last cited. He held, that before the legislature could authorize the agents of the state, or others, to enter upon, or occupy, or destroy, or materially injure the private property of an individual, except in cases of actual necessity which would not admit of any delay, an adequate and certain remedy must be provided whereby the owner of such property might compel the payment of his damages or compensation. He was not bound to trust to the justice of the government to make provision for such compensation by future legislation. By this he did not intend to decide, that the legislature might not authorize a mere entry upon the land of another, for the purposes of examination, or of making preliminary surveys, which otherwise would be a technical trespass, but no real injury to the owner of the land, although no previous provision was made by law to compensate the individual for his property if it should afterwards be taken for public use. But it was not the intention of the framers of the constitution to authorize the property of the citizen to be taken, and actually appropriated to the use of the public, and compel him to trust to the future justice of the legislature to provide

(*a*) *Jerome* v. *Ross*, 7 Johns. Ch. R. 344.

him a compensation therefor. The compensation must be either ascertained and paid to him before his property was thus taken and appropriated, or an appropriate remedy must be provided, and an adequate fund whereby and out of which he might obtain such compensation, through the medium of courts of justice, if those whose duty it was to make such compensation should refuse to do it. In the ordinary case of lands taken for the making of public highways, or for the use of the state canals, such a remedy was provided, if the town, county, or state officers refused to do their duty, in ascertaining, raising, and paying such compensation, in the mode prescribed by law; the owner of the land had a remedy by mandamus to compel them to perform their duty. In such cases the public purse, or the property of the town or county upon which the assessment was to be made, might be justly considered an adequate fund: but when it was left to future legislation, he would have no such remedy against the legislature to compel the passage of the necessary laws, either to ascertain the amount of compensation he was to receive, or the fund out of which he was to be paid. He also held that the citizen whose property was thus taken from him without his assent, was not bound to trust to the solvency of an individual, or even a corporation, for such compensation.(*a*)

§ 323. When the case last cited was before the supreme court,(*b*) that court held, that the legislature might authorize a rail road company, by their agents, surveyors and engineers, to enter upon the lands of an individual for the purpose of making a survey and examinations, so as to determine the most advantageous

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(*a*) *Bloodgood* v. *The Hudson and Mohawk R. R. Co.*, 18 Wend. 17.
(*b*) *Bloodgood* v. *The Hudson and Mohawk R. R. Co.*, 14 Wend. 51.

route for the proper line or course whereon to construct their road or way, previous to acquiring the title to lands required for that purpose, or the assessment and payment of damages. It also held, that the company might enter upon the land in like manner, previous to acquiring title to the land, or having the damages appraised or paying the same. The purchase of the land it held, was a condition precedent to the vesting of the fee simple, but not to the right to enter, and take possession and use the land for the purposes of a rail road. But when this case came under review in the court for the correction of errors,(*a*) that decision was overruled, and it was decided that it was a condition precedent that the damages should be assessed and paid, before the company had any right to enter upon and actually appropriate the land for the purposes of a rail road. It was not to be presumed the legislature intended, or that it meant to authorize the company to enter upon the land of an individual, pull down his buildings and other erections, before assessment and payment for the same; or to leave the individual to seek an uncertain remedy by action. The decision above referred to, by the court of dernier resort, settles the construction to be put upon this clause in our constitution in this respect.

§ 324. The constitution of Mississippi is explicit. "The compensation shall be *first made.*" Under the provisions of that constitution it has been held, payment is a condition precedent; such payment must precede the seizure for public use. Hence an act which authorized such seizure for public use without providing such previous compensation was declared unconstitutional and void.(*b*)

(*a*) 18 Wend. 9.

(*b*) *Thompson* v. *Grand Gulf Rail Road and Banking Company*, 3 How. Miss. R. 240.

§ 325. The question has frequently arisen, what use of property, under this right of eminent domain, was to be regarded as a public use. This question, as we have already seen, is not without embarrassment, as the line of demarcation between a use that is public and one that is strictly private is not easily drawn. One thing, however, is certain, the necessities of the public for the use to which the property is to be appropriated must exist as the basis upon which the right is founded. Hence it is, that where the property is wanted merely for ornamental purposes, this right cannot be exercised, as the purpose must be both necessary and useful.(*a*) It must also be a public one. The reason why it must be a public and not a mere private one seems to be, that the right itself is one founded upon the exigencies of the public, which are paramount to private interest, and upon the principle of an implied assent on the part of those who hold property, that it shall yield to the paramount demands of the public exigencies. But so far as it regards private interest, and private rights, there is no such implied assent, nor is there any such thing as a preponderance in favor of a mere private right of one citizen over the private right of another citizen, which should turn the scale against the right of the one in favor of the right of the other. Chancellor Walworth has, in one case, recognized the doctrine, that the right of eminent domain is founded upon the implied assent of the citizen. He held, "it was no part of the contract between the crown and its grantees, or their assigns, that the property should not be taken for public use upon paying a just compensation, whenever the public interest or necessities required it should be so taken. All separate interest of individuals in property is held of the

(*a*) Paterson, J., 12 Pick. 480.

government under this tacit agreement, or implied reservation. Notwithstanding the grant to individuals, the eminent domain, the highest and most exact idea of property, remained in the government, or in the aggregate body of the people, in their sovereign capacity, and they had a right to resume the possession of the property in the manner directed by the constitution and the laws of the state whenever the public interest required it." It was doubtless from the view of the non-existence of the right to take private property for mere private purposes, no provision was made in our written constitution providing for compensation in case private property should be taken for private purposes. It has been justly said, "if the right exists to take private property for private purposes, it may, under our constitution, be exercised without any reference to compensation."

§ 326. That the use must be a public one has frequently been recognized in the courts of this state, under its former constitution, which provided, "private property shall not be taken for public use without just compensation." In *The Matter of Albany Street*,(*a*) it was determined, that the corporation of New York had not the power to take more of the land of an individual for the purpose of a street than was actually required for that purpose, and that an act relating to the city of New York, which authorized the commissioners of assessment and estimate to include in their assessment the whole of a lot, when part only was required for the use of a street, by means whereof the fee became vested in the corporation, upon the confirmation of the report, was unconstitutional, when such lands were taken without the assent of the owner. Chief Justice Savage in that case said, "If this provision was intended merely to give

(*a*) 11 Wend. 149.

to the corporation capacity to take property under such circumstances with the consent of the owner, and then to dispose of the same, there can be no objection to it. But if it be taken literally, that the commissioners may, against the consent of the owner, take the whole lot, when only a part is required for the public use, and the residue to be applied to a private use, it assumes a power which, with all respect, the legislature did not possess. The constitution, by authorizing the appropriation of private property to public use, impliedly declares, that for any other purpose private property shall not be taken from one and applied to the private use of another. It is in violation of natural right, and if not in violation of the letter of the constitution, it is of its spirit, and cannot be supported.(*a*)

§ 327. In the case of *Bloodgood* v. *The Mohawk and Hudson R. R. Co.*,(*b*) a distinguished member of the court for the correction of errors made a most clear, lucid, and forcible argument on this question, which, as we cannot abridge without impairing its force, we give at length. "It has never been allowed to be a rightful attribute of sovereignty in any government, professing to be founded upon fixed laws, however despotic the form of the government might be, to take the property of one individual or subject, and bestow it upon another. The possession and exertion of such a power would be incompatible with the nature and object of all government; for it being admitted that a chief end for which government is instituted, is that every man may enjoy his own; it follows necessarily that the rightful exertion of a power by the government of taking arbitrarily from any man what is his own for the pur-

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(*a*) See also *Dunn* v. *City Council*, Harp. R. 189.
(*b*) 18 Wend. 56.

pose of giving it to another, would subvert the very foundation principle upon which the government was organized, and resolve the political community into its original chaotic elements. This power, therefore, instead of being acknowledged, was expressly repudiated by the Roman law at the height of imperial despotism; so that even when the lives of subjects were wantonly sacrificed by thousands at the remorseless biddings of cruel and capricious tyrants, no idea seems to have been entertained that they could, except by the interposition of legal forms, transfer the property of one subject to another. Even Hobbs, the most ingenious of all advocates for the absolute powers of government, does not go further with his doctrine on this point than to say, that the property which a subject has in his goods, consists not in a right to exclude the sovereign from the use of them, but consists in a right to exclude all other subjects from a use of them. But no approved writer on public law will be found to go as far as Hobbs in vindicating the unqualified right of the sovereign to assume at will the property of the subject. Every other writer is disposed to recognize a distinction between right and power, as applied to sovereign and subject, and to acknowledge that a rightful government must be founded on some other principle than that of mere force. Hence, an original compact, founded in the mutual necessities of the individuals about to constitute a political community, is implied in all cases; and the respective rights of sovereign and subject are referred to this supposed compact for their ascertainment. It follows, of course, that as the terms of this compact are capable of being shown only argumentatively, differences of opinion will exist in regard to them. To avoid this difficulty is one great purpose of written constitutions. But though differences of opinion exist as to the extent of the principle of the inviolability of private property, the secure

possession and undisturbed enjoyment of property by individuals, is universally admitted to be the great cement of the social compact, and every publicist therefore feels the necessity of prescribing some safeguards for it against the encroachments of the sovereign power. At the same time all are ready to acknowledge it to be a principle of the social compact, assented to by the original members of it, that in public emergencies the right of individuals over their property must yield to the superior necessities of the state. Whether this principle be denominated the right of transcendental property, or of eminent domain; or as is more properly called by Grotius, the force of super-eminent dominion; it means nothing more or less than an inherent political right, founded on a common necessity and interest, of appropriating the property of individual members of the community to the great necessities of the whole community. This principle or right does not rest, as supposed by some, upon the notion that the state had an original and absolute ownership of the whole property possessed by the individual members of it, antecedent to their possession of it, and that their possession and enjoyment being subsequently derived from a grant by the sovereign, it is held subject to a tacit agreement or implied reservation, that it may be resumed; and all individual rights be extinguished by a rightful exertion of sovereign power. Such a doctrine is bringing the principles of the social system back to the slavish theory of Hobbes, which, however plausible it may be in regard to lands once held in absolute ownership by the sovereignty, and directly granted by it to individuals, is inconsistent with the fact that the security of pre-existing right to their own property is the great motive and object of individuals for associating into governments. Besides, it will not apply at all to personal property, which in many cases is the entire creation

of its individual owner; and yet the principle of appropriating private property to public use is full as extensive in regard to personal as to real property. But in whatever this principle is founded, the difficulty is not the less in determining the limits that rightfully bound it. On this point, the writers upon public law are not agreed, nor is any one of them, that I have been able to consult, satisfactory; for, while all admit that the sovereign or transcendental propriety consists in the right of taking the property of individuals for the necessities of the state, no one succeeds in defining clearly the degree of necessity that justifies the exertion of this right: perhaps from the nature of the case, such a definition is impracticable. Grotius(*a*) asserts that the power can be exerted rightfully, not only in cases of extreme necessity, but for those of public utility, (*ad publicam utilitatum;*) while Puffendorf says, that "transcendental propriety never takes place but in the extremities and necessities of the commonwealth;" and yet he quotes from Bæcler what he says in his commentaries upon Grotius, "that this necessity hath its different degrees, and that it is not only in the last extremity this power should be made use of," though Bæcler admits "that it should not be extended too far, but should be reduced to equity as nigh as possible." Bynkershoeck insists that private property connot be taken on any terms without the consent of the owner, for purposes of public ornament or pleasure: and as Burlamague in his principles of law(*b*) speaks of this right as not to be exercised, "except in cases where it is absolutely necessary for the public good;" and again,(*c*) that "it takes place only in case of necessities of state, which ought not to

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(*a*) Lib. 3, ch. 20., sec. 7.
(*b*) Page 145.
(*c*) Page 130.

have too great an extent, but it should be tempered as much as possible with the rules of equity." No doubt it was in full view to the discordant opinions expressed by writers on public law, in regard to the application of the principles of super-eminent dominion, and with a mature design of affording special and additional protection to the citizen against the exertion of it by the government, that the framers of our national constitution adopted the clause in question; and it is reasonable to presume, that from the same motives and for the same object, it was transcribed literally from that instrument into the constitution of this state. In both instruments it is designed to be as well a limitation as a definition of the right of the respective governments as sovereign political powers, to interfere with the otherwise absolute right of the citizen, to the undisturbed possession and enjoyment of his own property. It is therefore, I think, to be construed in both cases as equivalent to a constitutional declaration, that private property, without the consent of the owner, shall be taken only for the public use, and then only upon a just compensation.

§ 328. In another case,(*a*) the doctrine was held, by Justice Bronson, that private property could not be taken for private use; that the statutes of the state of New York which authorized the laying out of a private road over the lands of another, was unconstitutional. He discussed in a very able manner the constitutionality of such an act under our constitution, and as to what was to be implied under the general grant of legislative power contained in the constitution. He held, under our constitution, the legislature is not supreme; it is only one of the organs of that absolute sovereignty, which resides in the whole body of the people. We no where found

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(*a*) *Taylor* v. *Porter*, 4 Hill, 140.

a delegation of power to the legislature to take the property of one and give it to another, either with or without compensation. Only one clause in the constitution could be cited in support of the power, and that was the first section of the first article, which declared, "The legislative power of this state shall be vested in a senate and assembly." He admitted that the two houses, subject only to the qualified negative of the governor, possessed all the legislative power of the state. But the question presented itself, what was that "legislative power," and how far did it extend? He held, as we have already had occasion to show in another chapter, it did not reach the life, liberty, or property of a citizen, who was not charged with a transgression of the laws, and when the sacrifice was not demanded by a just regard for the public welfare. The security of life, liberty, and property lay at the very foundation of the social compact. To say that this grant of "legislative power," included the right to attach private property, was equivalent to saying that the people had delegated to their servants the power of defeating one of the great ends for which the government was established. Without one word of qualification in the whole instrument, he should feel great difficulty in bringing his mind to the conclusion that the clause he then had under consideration had clothed the legislature with despotic power. That such would be the extent of their authority if they could take the property of one citizen and give it to another, either with or without compensation. He also held, in that case, that this question under our then constitution did not necessarily turn on the section granting legislative power. But that it also contained negative words under the clause, "no member of the state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers. That the meaning

of this section was, that no member of this state should be disfranchised or deprived of his right or privileges, unless the matter should be adjudged against him, upon trial had according to the course of the common law. That it must be ascertained judicially that he had forfeited his privileges, or that some one else had a superior title to his property, before either of them could be taken from him. It could not be done by legislation. If there was any doubt, the remaining clause was decisive. The whole clause when read together, if it did not amount to a direct prohibition against taking the property of one and giving it to another, it contained at least an implication too strong to be resisted, that such an act cannot be done. That such trial or judgment was not necessary in exercising the right of eminent domain. For when private property was taken for public use the only restriction was, that just compensation shall be made to the owner.

§ 329. Chancellor Walworth has held,(*a*) the right of eminent domain did not imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest would in no way be promoted by such transfer, and if the legislature should attempt thus to transfer the property of one individual to another, where there could be no pretence of benefit to the public by such exchange, it would probably be a violation of the contract by which the land was granted by the government to the individual, or to those under whom he claimed title, and thus be repugnant to the constitution of the United States. In a subsequent case,(*b*) he reiterated the same views, and said, "it is not pretended, that even under the arbitrary government of the Roman emperors it was

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(*a*) *Beekman* v. *Saratoga and Schenectady Rail Road Co.*, 3 Paige, 73.
(*b*) *Varick* v. *Smith*, 5 Paige, 159.

lawful or justifiable for the sovereign to take the property of one citizen and give it to another, where the public interest was not concerned in such transfer."(*a*)

§ 330. Mr. Thomas, in his treatise,(*b*) while he admits the general right of the sovereign power to control or dispose of private property, paying a just compensation therefor, and to regulate and control the enjoyment of things before existing in common, considers a causeless or corrupt limitation of pre-existing rights as an abuse of the power. The chancellor, in the case last cited, says, "Perhaps in England, where the power of parliament is said to be omnipotent, so far as the exercise of mere human power is concerned, there may be no remedy for such an abuse of power, where it is by a concurrent act of the three estates of the realm. But in a state which is governed by a written constitution, like ours, if the legislature should so far forget its duty, and the natural rights of an individual, as to take his private property and transfer it to another, where there was no foundation for a pretence that the public was to be benefitted thereby, he should not hesitate to declare that such an act was an abuse of the right of eminent domain, was an infringement of the spirit of the constitution, and therefore not within the general powers delegated by the people to the legislature." Thus, in this state, it may be regarded as well settled that private property cannot be taken for any other than a public use, either with or without compensation, and that it cannot be taken even for such public use, without such compensation is actually secured to the owner, before it is taken and appropriated to such use.(*c*)

(*a*) Domat's Civil Law, b. 1, tit. 2, sec. 12.

(*b*) Thomas's Universal Jurisprudence, 171.

(*c*) See also *Case* v. *Thompson*, 6 Wend. 634. *Day* v. *Stetson*, 8 Greenleaf, 365.

§ 331. A special act of the legislature in each particular case is not necessary to the exercise of the power of eminent domain; but it may be exercised through the action of general laws and judicial tribunals.(*a*) In the case last cited, it was contended that the power to take by eminent domain could not be transferred to any subordinate agent, but must be exercised by the state itself. In answer to this objection Parker, Ch. J., said, "That the argument seemed to be, that each individual exercise of the power must be by a legislative act. No authority was cited in support of this proposition, and it certainly was in conflict with the practice of the government from its first institution, and, it was believed, with that of all others in the United States. As early as 1639, the colony of Massachusetts Bay made provision for laying out highways, through the advice of the court of the county, and the appointment by such courts of individuals for that purpose.(*b*) In 1641 and 1642, the inhabitants of the settlements then existing in New Hampshire united themselves to the Massachusetts colony. On the separation in 1680, and the organization of a provincial government there, it was enacted by the assembly that the laws they had been formerly governed by should be the rule in judicial proceedings, so far as they would suit our constitution, and not repugnant to the laws of England, and until others were legally published. And in 1719 an act was passed by which the courts of quarter sessions were empowered to appoint committees to lay out highways.(*c*) Similar provisions, authorizing courts of the counties to exercise a jurisdiction for this purpose, had been enacted, and acted upon, without any question respecting their constitutionality,

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(*a*) *Backus* v. *Lebanon*, 11 N. H. R. 19.
(*b*) Charter and Colony Laws, 26.
(*c*) Prov. Laws, 153.

until the present time. It would require very strong reasons to authorize breaking in upon and condemning this continued practice of two centuries. But none had been suggested, and none presented themselves to the court. If the power of eminent domain was exercised through the action of general laws and judicial tribunals, there was probably as little danger to be apprehended from its abuse as in any mode which could be devised."

§ 332. In Massachusetts the question has arisen as to the character of property taken for a public use, which would entitle the owner to the protection secured to private property, under the constitution. It has been held, that the provision in the tenth article of the declaration of rights, "that whenever the public exigencies require that the property of an individual should be appropriated to public uses, he shall receive a reasonable compensation therefor," does not extend to the case of an indirect or consequential damage or expense, by means of the right use of property already belonging to the public; but was confined to cases where there was a direct appropriation of the property of individuals, by virtue of legislative acts, to public uses.(*a*)

§ 333. In another case,(*b*) it was held, that the diversion of tolls from an old bridge or turnpike, by granting a new one, was such consequential damage, was not the taking of private property for public use, within the provision of the constitution requiring compensation to be made in such cases. In the case of *The Piscataqua Bridge* v. *New Hampshire Bridge*,(*c*) it was decided, that the exclusive grant of a bridge gave to the grantee a franchise, and the legislature could not authorize the erection of another bridge within the same limits, with-

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(*a*) *Callender* v. *Marsh*, 1 Pick. 418.

(*b*) *Charles River Bridge* v. *Warren Bridge*, 7 Pick. 344.

(*c*) 7 N. H. R. 35.

out provision for compensation to the first grantee. But that such franchise was property, and another grant to build another bridge within the same limits might afterwards be made if compensation be provided. But that it was not, however, sufficient to authorize the erection of such other bridge that the grantee might obtain compensation by action for the wrong done in erecting it, when no provision for compensation had been made in the second grant.

§ 334. In *Edwards* v. *Pope*,(*a*) it was held, that where an act authorizing a sale instead of partition, gave the commissioners authority to lay out the property into lots and streets, and declared such streets when thus laid out, public streets and highways, was not such a taking of private property for public use as to require that compensation should be made. That this was done to enhance the value of the other property, and for the benefit of the owners. The court held, by every rule of interpretation applicable to this act, it could not resist the conclusion, that all these proceedings were intended to enhance the interest of the proprietors. The state was not seeking to take private property for public use. It neither needed, asked, or required a public highway there. The act declared the streets public, not because it wanted one, but to secure by this, public easement and increased competition and value to the lots. It was clear and manifest, that the intention of the parties and the legislature was to enable the parties, by petition, through the order of the court and the action of the commissioners, to lay off the land into lots and streets; but because the proprietors might at any time resume their rights to the fee of the streets, to the injury of the pur-

(*a*) 3 Scam. R. 471.

chaser of lots, which would prevent their sale at a fair value, the commissioners were empowered to record a plat, and when so recorded the streets were declared public highways. This but empowered the parties to do that for themselves which they could not do by reason of infancy, they not being known, or being non-residents.

§ 335. We have said the most difficult question which has arisen under such restrictive clauses in the constitution is, as to what use of property is to be regarded as a public use, so as to justify the taking of it, upon compensation being made. Upon this question there has been a great conflict of opinion. We shall not undertake to discuss, in this connection, the accuracy or inaccuracy in our judgment of the decisions that have been made on this point. Although we regard many of them as unauthorized by any fair construction, and cannot but believe that the constitution, in many of the decisions which have been made on this point, has been forced to yield to the overpowering influence of private interest and popular clamor. The views which we have heretofore expressed would not give sanction to many of them.

§ 336. In Tennessee it has been held, that the legislature might make grist mills *public mills*, and authorize the court to condemn the lands of individuals for the use of such mills, providing a compensation for such lands.(*a*) In Massachusetts it has been held, that the construction of dams by a corporation, for obtaining a head and fall of the waters of a navigable arm of the sea, and working mills, and also for providing a toll road over the dams, was such a public enterprise as authorized the legislature to appropriate private property thereto.(*b*)

(*a*) *Harding* v. *Goodlet*, 3 Yerg. 41.

(*b*) *Boston and Roxbury Mill Dam Co.* v. *Newman*, 12 Pick. 467.

§ 337. In Maine it has been also held, that a private fishery might be taken, opened and improved for the benefit of the inhabitants further up the stream, and that such taking was for the public use, and that although the emoluments of the improved fishery were granted to two towns. The decision in that case was placed upon the ground, that the public had an interest in the preservation and regulation of the fishery, and in the removal of the obstructions by which it might be impaired. In Alabama it has been held, that the legislature might authorize a corporation to take private property for the site of a bridge and for the purpose of making a passage thereto, and that such use was a public use.(*a*)

§ 338. In Vermont and New Hampshire it has been held, that the easement or franchises of a turnpike corporation, might be taken when necessary for a public highway.(*b*) It has also been held, that the power of eminent domain in taking the property and franchises of a corporation for a public use, might be exercised notwithstanding that the charter of the corporation contained a provision that the legislature might purchase the property at a certain price.(*c*) It was contended in the case last cited, that the state having made provision by which the state might acquire the property on certain terms, the right of eminent domain was strictly provided for, and could not be exercised in any other mode. But the court held, that did not by any means prove that the right of eminent domain was thereby surrendered, even if the legislature might be supposed to possess the power to make such a surrender. The act provided a mode by

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(*a*) *Dyer* v. *The Tuscaloosa Bridge Co.*, 2 Porter, 296.

(*b*) *Armington* v. *Barnett*, 15 Vt. R. 745. *Pierce* v. *Somersworth*, 10 N. H. R. 369. See also, *Piscataqua Bridge* v. *New Hampshire Bridge*, 7 N. H. R. 35. *Backus* v. *Lebanon*, 11 id. 19.

(*c*) *Backus* v. *Lebanon*, 11 N. H. R. 19.

which the government might, after a certain period, come into possession of all the property of the corporation; and a mode which would not have existed, but for the provision in the charter itself. But that this reservation did not seem to imply, in any manner, a relinquishment of any right by which the property of a corporation, or a part of it, might be taken for public use. That if the legislature should grant land to an individual in fee, with a reservation of a right, at the expiration of a term of years, to resume the property granted upon the repayment of the purchase money, with interest, that could not be construed as implying that a public highway should not be laid through it in the ordinary exercise of the power of eminent domain. And the principle would be the same, if the tract was of such a shape and character that the whole of it was afterwards required by the public exigencies.

§ 339. The doctrine has also been usually conceded, that private property may be taken for the purpose of constructing turnpike roads by turnpike corporations, and that land thus taken is taken for public use; and so as it regards canals, ferries, wharves and basins, and for the purpose of draining swamps, &c., and carrying water to cities. In the state of New York, the court for the correction of errors have sanctioned the doctrine, that the legislature of the state has the constitutional power to authorize the taking of private property for the purpose of making a rail road, or other public improvement of like nature; whether such improvement be made by the state itself, or through the medium of a corporation or joint-stock company.(*a*)

§ 340. Chancellor Walworth, in the case of *Beekman*

(*a*) *Bloodgood* v. *The Mohawk and Hudson R. R. Co.*, 18 Wend. 9.

v. *The Saratoga and Schenectady Rail Road Company*,(*a*) first decided this question in this state. His decision in that case was placed on the ground, that if the public interest could in any way be promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with private rights for that purpose. That it was upon this principle that the legislature of the several states had authorized the condemnation of the lands of individuals for mill sites, where, from the nature of the country, such mill sites could not be obtained for the accommodation of the inhabitants without overflowing lands thus condemned. That upon the same principle of public benefit, not only the agents of the government, but also individuals and corporate bodies, had been authorized to take private property for the purpose of making public highways, turnpike roads, and canals, of erecting and constructing wharves and basins; of establishing ferries, of draining swamps and marshes, and of bringing water to cities and villages. That in all such cases the object of the legislative grant of power, was the public benefit derived from the contemplated improvement, whether such improvement was to be effected directly by the agents of the government, or through the medium of corporate bodies or of individual enterprise. In answer to the objection that a rail road differed from other public improvements, and particularly from turnpikes and canals, because travellers could not use it with their own carriages and horses, and that farmers could not transport their produce in their own vehicles; and that the company in this case

(*a*) 3 Paige, 73.

were under no obligations to accommodate the public with transportation; and that they were unlimited in the amount of toll which they were authorized to take; he held, that if the making of a rail road would enable the traveller to go from one place to another without the expense of a carriage and horses, he derived a greater benefit from the improvement than if he was compelled to travel with his own conveyance over a turnpike road at the same expense. And if a mode of conveyance had been discovered by which the farmer could procure his produce to be transported to market at half the expense which it would cost him to carry it there with his own wagon and horses, there was no reason why the public should not enjoy the benefit of the discovery; and if an individual was so unreasonable as to refuse to have the rail road made through his lands, for a fair compensation, the legislature might lawfully appropriate a portion of his property for the public benefit, or might authorize an individual, or a corporation, thus to appropriate it, upon paying a just compensation to the owner of the land for the damages sustained. The objection that the corporation was under no legal obligation to transport produce or passengers upon the road, was unfounded in fact. The privilege of making a road, and taking tolls thereon, was a franchise, as much as the establishment of a ferry, or a public wharf, and taking tolls for the use of the same. The public had an interest in the use of the rail road, and the owners might be prosecuted for the damages sustained, if they should refuse to transport an individual or his property, without any reasonable excuse, upon being paid the usual rate of fare.(*a*) The legislature might also, from time to time,

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(*a*) With all due deference to the learned Chancellor, we cannot assent to the entire accuracy of this last proposition. The rule of law he there lays down is one applicable to common carriers: in regard to them, it is a strictly

regulate the use of the franchise, and limit the amount of tolls which it should be lawful to take, in the same manner as they might regulate the amount of tolls to be taken at a ferry, or for grinding at a mill, unless they had deprived themselves of that power by a legislative contract with the owners of the road." The principles thus laid down have in this state received the judicial sanction of our court of dernier resort, and may now be considered as engrafted upon the constitutional power of the legislative department. Although we cannot but regard the decision in this case, and also that in the case of a mill, as antagonistical to the letter and spirit of this clause in the constitution, and should, were it now to be regarded as an open question, coincide with the clear, and to our mind conclusive, view of this question taken by Senator Tracy in the case of *Bloodgood* v. *The Mohawk and Hudson Rail Road Company*.(*a*)

§ 341. In Massachusetts it has been held that an act of the legislature authorizing the building of a bridge over navigable water, within the bounds of the commonwealth, was constitutional. In answer to the objection, that this grant was made upon the petition and for the sole benefit of individuals, and was not needed for the accommodation of the public, it was said, in all cases the

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correct legal proposition. The mere act of acceptance of the franchise granted, does not constitute such a corporation common carriers; nor does it impose upon it any of the duties of common carriers; until it shall in fact become such by some subsequent act, this rule of law has no application to it. Whether it ever shall have any application depends on the mere volition of a soulless corporation, and its subsequent election not to assume any such obligation, might defeat this principle from ever having any application to it; for that election may not be made until years after private property has been seized, entered upon, and used by the corporation, and the citizen dispossessed —and then it may elect never to assume the responsibilities of common carriers; and in that event this principle of law would never have any application to such a corporation.

(*a*) 18 Wend. 17.

legislature had the power to inquire whether the public convenience and necessity demanded partial obstructions and interruptions to navigation, and upon what terms and conditions they might be established. It was true that the leading motives of the defendants in erecting the bridge was private profit. And so almost all other enterprises, many of which had resulted in great public improvement, had originated in motives of private gain. It was also true that others, as well as the proprietors might have occasion to go upon the Island; for such the bridge was an accommodation. Whether so many were thus accommodated, that it might be said to be of common convenience, was a question which it was the province of the legislature to determine, and which might be presumed had been correctly determined.(*a*)

§ 342. In Pennsylvania in the case of *Philadelphia* v. *The Trenton Rail Road Company*,(*b*) it was held that the provision in the constitution of that state, that private property should not be taken for public use without just compensation, did not prohibit the legislature from granting to a rail road company the privilege of laying rails on and using a public street in a city or town for the purpose of a rail road. Mr. Justice Rogers, in another case, says: "It cannot be denied that the legislature have the power to authorize the taking of private property for the public streets, upon making just compensation. The right of resumption not only results from the right of eminent domain, but it is recognized in the constitution of this state with this statutory reservation, that the property of the citizen shall not be taken and applied to public use, without just compensation being made. With this restriction, it may be exercised not

(*a*) *The Commonwealth* v. *Breed*, 1 Pick. R. 463.
(*b*) 6 Whart. 25.

only when the safety, but also when the interest or expediency of the state is concerned; or where lands of an individual are wanted for a road, street, canal, rail road, or other public improvement."(*a*)

§ 343. In another case the constitutionality of an act taking private property for the purpose of a rail road came directly in question.(*b*) In that case Chief Justice Gibson said, "the most material point in the cause is, that which involves the constitutionality of the statute on which the defendant's right is founded; but it is one about which little need be said. If there is an appearance of solidity in any part of the argument, it is that the legislature have not power to authorize an application of another's property to private purposes, even on compensation being made, because there is no express constitutional affirmance of such a power. But who can point out an express constitutional disaffirmance of it? The clause by which it is declared that no man's property shall be taken, or applied to public use, without the consent of his representatives, and without just compensation made, is a disabling, not an enabling one; and the right would have existed in full force without it. Whether the power was only partially restrained, for a reason similar to that which induced an ancient lawgiver to annex no penalty to parricide, or whether it was thought there would be no temptation to the act of taking the property of an individual for another's use, it seems clear, that there is nothing in the constitution to prevent it; and the practice of the legislature has been in accordance with the principle, of which the application of another's ground to the purposes of a private

(*a*) *McMaster* v. *The Commonwealth*, 3 Watts' R. 294.
(*b*) *Harvey* v. *Thomas*, 10 Watts' R. 66.

way is a pregnant proof. It is true, that the title of the owner is not divested by it; but, in the language of the constitution, the ground is nevertheless "applied" to private use. It is also true, that it has usually, perhaps always, been so applied on compensation made; but this has been done from a sense of justice, and not of constitutional obligation. But as in the case of the statute for compromising the dispute for the Connecticut claimants, under which the property of one man was taken from him and given to another, for the sake of peace; the end to be attained by this lateral rail road law is the public prosperity. Pennsylvania has an incalculable interest in her coal mines; nor will it be alleged that the incorporation of rail road companies, for the development of her resources, in this or any other particular, would not be a measure of public utility; and it surely will not be imagined that a private right given to an artificial person, would be less constitutional than if given to a natural one."

§ 344. In Massachusetts it has also been held, that where a corporation was empowered to build a dam over an arm of the sea, and construct a basin, and to have the use of lands for certain purposes, that it was within the constitutional power of the legislature to authorize a rail road corporation to construct their road across the basin, making compensation to the corporation whose property was thus used. That the grant of this authority to the rail road corporation could not be considered as annulling or destroying the franchise granted to the other corporation. That the right of the latter constituted an interest and qualified property therein no greater nor of a different nature than a grant of land in fee, and hence did not necessarily withdraw it from a liability to which all lands in the commonwealth were subject, to be taken for the public use for an equivalent, whenever, in the opinion of the legislature, the public exigency re-

quired it; and that the effect of the rail road act was merely to appropriate to another and distinct public use a portion of the lands over which the former franchise was to be used; and that if the whole franchise should become necessary for the public use, the right of eminent domain would authorize the legislature to take it, on payment of a full equivalent. This case seems to have taken it for granted, that this use of the property by the rail road corporation was a public use.(*a*)

§ 345. Chief Justice Shaw, in the case last cited, said, "It is difficult, perhaps impossible, to lay down any general rule that would precisely define the power of the government, in the exercise of the acknowledged right of eminent domain. It must be large and liberal, so as to meet the public exigencies, and it must be so limited and restrained, as to secure effectually the rights of the citizen. It must depend, in some instances, upon the nature of the exigencies as they arise, and the circumstances of particular cases. In the present case, the court are all of the opinion, that the rights of the plaintiffs in the land of the fall and receiving basin, are not of such a character as to exclude the authority of the legislature from taking a small portion of it, for laying out a rail road, it being for another and distinct public use, not interfering with the franchise of the plaintiff."

§ 346. Having considered the qualified restrictions upon legislative power under the heads above stated, we shall proceed, in the next place, to the consideration of those of an absolute character. Some of the state constitutions, for instance that of Maine, prohibits the passage of bills of attainder, *ex post facto* laws, or laws impairing the obligation of a contract; and in others, that

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(*a*) *Boston Water Power Company* v. *Boston and Worcester Rail Road Company*, 23 Pick. R. 360.

of New Hampshire for instance, that no retrospective law shall be made. We have already considered in the preceding chapter what are bills of attainder, *ex post facto* laws, and what laws have or have not been considered as impairing the obligation of a contract. Such decisions and definitions apply with equal force to all provisions of a similar character in the respective state constitutions; hence, we shall omit in this connection any further consideration of them.

§ 347. The constitutions of several of the states declare substantially, that the government shall be vested in three departments, the legislative, executive, and judicial; and contain provisions that neither of those departments shall exercise any power properly belonging to the other. The question has arisen, whether particular acts of the legislature were not unconstitutional, on the ground of conflict with such provisions. In order to a correct determination of this question, the line of demarcation between an act legislative, and one that is executive or judicial, must be kept distinctly in view. If an act of the legislature in terms judicially determines a question of right or of property, as the basis upon which the act is founded, so far the act must be regarded as a judicial act, and repugnant to the constitution. But if the act simply authorizes the doing of an act with the view of attaining a given end, or accomplishing a particular result, without any determination of the fact of the existence of that which secures to a party a right to the fruits of the act; such an act is not liable to this constitutional objection. In accordance with this principle, it has been held, that an act of the legislature which authorized A to sell so much of the lands of a deceased person as would be sufficient to raise a specific sum, together with interest and costs, and directing that the proceeds should be applied to the extinguishment of the claims of A and B against the estate of the deceased,

for monies advanced and liabilities incurred by them, on account of the estate, was unconstitutional, on the ground that it was a judicial determination of the fact that the estate was indebted to A and B, for monies advanced and liabilities incurred on account of the estate.(*a*)

§ 348. On the same principle it has been decided, that an act of the legislature which directed among other things, the assignment of dower to a widow by certain commissioners, so far as it was a judicial determination that she was entitled to dower, was null and void, on the ground that the legislature had no power to inquire into, or ascertain and determine her rights in the premises.(*b*) An act of the legislature granting a divorce, and directing payment by the husband of a given sum for alimony, so far as it granted alimony has been considered a judicial act, and on that account unconstitutional.(*c*) This decision held, that although in the state of Maryland the granting of a divorce had been and might be performed by the legislature, yet that section which directed alimony, was an exercise of judicial powers. The granting of alimony was within judicial cognizance. Under the 6th section of the bill of rights, it was declared, "*That the legislative and judicial powers of government ought to be forever separate and distinct from each other.*" This political maxim had made its appearance in some form in all the state constitutions framed about the time of the war of the revolution, and was said to have been borrowed from *Montesquieu.*(*d*) In whatever terms it had been adopted, in none of the constitutions had the judiciary and legislative departments been

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(*a*) *Lane* v. *Dorman*, 3 Scam. R. 240.
(*b*) *Edwards* v. *Pope*, 3 Scam. R. 465.
(*c*) *Crane* v. *Megnis*, 1 Gill. & John. R. 475.
(*d*) Spirit of Laws, vol. i. p. 181.

kept wholly separate and unmixed. In some the executive was appointed by the legislature, and the judiciary by the executive. In others, the powers of the several departments were still more blended and mingled together. It seemed to have been the intention to have engrafted this invaluable maxim of political science on their respective systems, only so far as comported with free government, and to prohibit the exercise by one department of the power of another department, or to confine each department to the exclusive exercise of its own powers. This idea had been admirably expressed in the constitution of Massachusetts, "The legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; and the judiciary shall never exercise the executive and legislative powers, or either of them." The inhibition went to the practical exercise of powers conferred by the constitution, and to be used after it was in operation, and did not apply simply to the original distribution of powers among the departments of government. It was in the same sense, this 6th article in the bill of rights should be construed, which had the same object in view as the constitution of Massachusetts, although somewhat different terms were employed to express it. The one imitated the language, the other dived into and expressed the meaning of the venerated author from whom they both copied. Their common purpose was to confine in practice the action of each department to its own appropriate sphere, forbidding it the use of powers allotted to the co-ordinate departments. That the act in question was the exercise by the legislature of judicial powers, and hence repugnant to the constitution.

§ 349. In Tennessee an act of the legislature, passed upon the application of the guardian of the infant heirs

of a deceased ancestor, with the approbation of the minors, authorizing the guardian to sell certain lands of which the ancestor died seised, and declaring the proceeds assets, was declared unconstitutional and void, for the reason it was not the exercise of legislative power, but one of a judicial nature. It was said it did not partake of the character of a law, as it formed no rule of action of that uniform and universal character which Blackstone in his commentaries had said constitutes the fundamental principle of a municipal law. It was but a judicial decree enacted upon the avowed ground, that the estate of the ancestor was indebted. It adjudged the existence of debts, and decreed the land to be sold for their payment. Although it was in the form of a law, it did not differ in substance from a judicial decree. If in substance a judicial decree, the form in which the makers had thought fit to clothe it, could not alter its character.(*a*)

§ 350. In New Hampshire a question was submitted to the judges, whether the legislature could authorize a guardian of minors, by a special act or resolve, to make a valid conveyance of the real estate of his wards? They expressed a decisive opinion against the exercise of such a power. Their decision was placed on the ground, that the exercise of such a power by the legislature was, in its nature, both legislative and judicial. It was the province of the legislature to prescribe the rule of law, but to apply it to particular cases was the business of courts of law. The 38th article of the bill of rights of that state declared, that "In the government of this state, the three essential powers thereof, to wit: the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the

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(*a*) *Jones* v. *Perry*, 10 Yerger's R. 59.

nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity." The exercise of such a power could never be necessary. By the existing laws of that state, Judges of Probate had very extensive jurisdiction to license the sale of the real estate of minors by their guardians. If the jurisdiction of that court was not sufficiently extensive to reach all proper cases, it might be a good reason why that jurisdiction should be extended, but could hardly be deemed a sufficient reason for a particular interposition of the legislature in an individual case. If it was fit and proper that a license should be given to one guardian, under particular circumstances, to sell the estate of his ward, it was fit and proper that all guardians should, under similar circumstances, have the same license. Such was the spirit and genius of their institutions. That an act of the legislature to authorize the sale of a particular minor's estate, by his guardian, could not be reconciled with the spirit of the article in the bill of rights, above cited.(*a*) This case may, perhaps, be regarded as in conflict with the decisions in other states.

§ 351. Where a legislative act does not in any manner determine any matter of fact, or of right, dependent upon matters of fact, such an act is not liable to an objection that it is the exercise of judicial powers; this principle has been recognized in many adjudged cases. In accordance with it, it has been held, an act of the legislature may be constitutionally passed which authorizes the sale of the estate of a deceased person for the payment of his debts generally, without any determination of the fact of, or the extent of such indebtedness, to any particular

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(*a*) Opinion of Judge, 4 N. H. R. 572.

person. This doctrine was affirmed by the federal court in the case of *Watkins* v. *Holman*.(*a*) The same doctrine has been held by several of the state courts.(*b*) The case of *Watkins* v. *Holman* was placed on the distinct ground, that the act was remedial; it contained no other features. An authority was given to the administrators to sell, in a particular manner, the property of an intestate, for the payment of his debts. It did not determine the amount of debts, nor to whom they were payable. It was proved the estate was insolvent. It was in conformity to the settled policy of the state which had passed the act in question, to apply the real estate of a deceased person in payment of his debts. The case then under consideration was one where the administrator resided in Massachusetts, and was desirous of selling the estate through an attorney, which did not come within the general act on that subject, and hence the necessity of a special act. This act, although special, did not in principle differ from the general law on the same subject, which was passed with knowledge on the part of the legislature, of its expediency and necessity. The special act was passed from a knowledge of its propriety in the particular case. The general law had pointed out a particular mode of procedure. That mode was required by the legislature from motives of expediency; but it by no means followed, that it was the only mode they could adopt. This was a question of power and not of policy, and on such a question the court could not test the act by any considerations of expediency. As it regarded the question of power in the legislature, no objection was perceived to their subjecting the lands of the deceased to the payment of his debts, to the ex-

(*a*) 16 Peters' R. 59.

(*b*) *Kirby* v. *Chilwood's Adm'rs.*, 4 Monroe R. 94.

clusion of his personal property. The legislature regulated descents, and the conveyance of real estate. To define the rights of debtor and creditor was their common duty. They might authorise a guardian to convey lands of an infant, which descended to him. They might give capacity to the infant himself to convey land. The idea that the lands of an infant, which descended to him, could not be made responsible for the payment of the ancestor's debts, except through a decree of a court of chancery, was novel and unfounded. So far from this being the case, the court had no doubt, that the legislature of a state had power to subject land of a deceased person to execution, in the same manner as if he were living. The mode in which this should be done was a question of policy and not of power, and rested in the discretion of the legislature.

§ 352. In *Kirby* v. *Chilwood's Adm'rs.*,(*a*) in which was involved the validity of an act of the legislature, which directed the sale of real estate of infants for the payment of the debts of the ancestor. Chief Justice Bibb, in delivering the opinion of the court, remarks: "The exercise of such a power has been, at least in one instance, resisted by the executive department, but has not been hitherto a subject of minute investigation in the judicial department. Indeed, these acts are so various in their nature, and different in their circumstances and objects, that no one constitutional provision could, perhaps, embrace the whole, and many must rest on their particular circumstances, and be opposed by different constitutional provisions. In the legislative department they have not been adopted without opposition, arising from constitutional objections; and it is perhaps a matter of regret, that so many

(*a*) 4 Monroe, 94.

have passed that body. One great objection seems to be, that the power of infants over their real estate is denied to them by the general laws of the land, and while their own volition is thus restrained, and their hands tied, these special laws dispose of their real estate, without their concurrence, without permitting them to be consulted; and whether the legislature can dispose of their real estate, and take it from them, by laws which operate like the revocation of a grant, consistently with every constitutional provision, is a question of much importance; but the particular circumstances of each case, and the object of the legislature in making such act, ought to be considered in deciding on each of these acts. We are aware that one objection, which presents a question of acknowledged difficulty, presents itself against legislative transfers of estates, without the consent of the owner, and that is, is such a proceeding within the scope of legislative authority, or is it a power belonging to other departments of the government, or to individuals themselves?" This point he did not pass upon, as the legislature had the power of subjecting estates to payment of debts; that this was within the compact, and conceded to legislative authority.

§ 353. *Shehun's Heirs* v. *Barrett*(*a*) involved the constitutionality of an act of the legislature of Kentucky, passed in 1796, with a preamble appointing commissioners over the estate of J. Barrett, for the benefit of his creditors. The preamble recited that Barrett had died intestate, leaving but little personal estate, and considerable lands; that he had sold, and not conveyed many of these lands, and that others would be lost for want of attention, and as nobody would administer upon his estate, his creditors were suffering. The act then vested

(*a*) 6 Monroe, 592.

the estate in certain commissioners, who were directed to convey in fulfilment of his contracts for lands, and to sell his personal estate and pay his debts, and if that proved insufficient, to sell and convey so much of said lands as might be necessary for that purpose, on a credit, and to apply the proceeds in discharge of his debts. They were also authorized to sue for debts due the estate, and made subject to suits by creditors. The court decided, on the authority of the case last cited, the act a valid one, as it had been held, that where real estate ought, by the general law of the land, to be sold for the payment of debts, the legislature might subject it by a special law for that purpose, when the rights of the parties concerned were held inviolable. The court however said, "We are still disposed to confine this decision exclusively to one class of cases, viz., to the subjecting lands to debts by special act, which were before subject to the same debts by the general laws of the land, without materially affecting the rights of parties; and we would not be understood as giving our sanction to other appropriations of the real estate of minors for other purposes." A learned judge, in another case, commenting on the two cases last cited, held, that he could discover nothing in them but doubtful affirmances of acts, where the sales were for the benefit of all the creditors, and the conveyance of land according to the previous contracts of the intestate. He then adds, "These cases are clearly distinguished from the case under consideration,(*a*) (to wit, a special act to sell land to pay particular debts, in specified sums, to particular creditors.) The acts in those cases were for the benefit of all the creditors of the estate, without distinction, and in one case in addition for the purpose of perfecting titles

(*a*) *Lane* v. *Dorman*, 3 Scam. R. 243.

contracted to be made by the intestate. The claims of the creditors were to be established by judicial or other satisfactory proceedings, and in truth, in the last case cited, the commissioners were nothing more than special administrators. The legislative department, in the passing of those acts, investigated nothing, nor did any acts which could be deemed a judicial inquiry. It neither examined proofs, nor determined the nature or extent of claims. It merely authorized the application of real estate to the payment of debts generally, discriminating in favor of no one creditor, and giving no preference over another. Not so in the case before us. The amount is investigated and ascertained, and the sale is directed for the benefit of two persons exclusively. The proceeds are to be applied to the payment of such claims and none other, for liabilities said to be incurred, but not liquidated or satisfied, and those two created after the death of the intestate."

§ 354. Where the legislature passed a special act, the preamble of which recited, that divers persons, some known and others unknown, some residents and others non-residents, were owners of certain tracts of land, and that a partition thereof would be extremely difficult, if not impracticable, and the act authorized any one interested to petition the circuit court of the property county in behalf of themselves and all others interested, without naming them, for the sale of said lands, and authorized the court on due proof of the publication of notice of the presentation of said petition, as required by the act, and upon its appearing that a partition of the said lands would be extremely difficult, if not impracticable, to order the sale of the same, and appoint three disinterested householders of the said county to lay off the same into town lots and streets, and to sell the lots on a credit, and on the payment of the purchase money to make deeds to the purchasers, which deeds were declared to

be valid and effectual to pass to the purchasers respectively, or their assigns, an estate in fee simple to the premises purchased. And the act further provided, that the streets should be and forever remain free, public, and common highways and streets.(*a*) It was contended, that the legislature had not the power exercised, under the constitution, because it was a judicial power, which was confided to another body of magistracy. The court said, the first section of the first article of the constitution has divided the powers of the government into three departments, the legislative to one, the judicial to another, and the executive to another; and the second section provides, that no person or collection of persons, being of one of these departments, shall exercise any power properly belonging to either of the others. The legislative is confided to the general assembly, the executive to the governor, and the judicial to the supreme and inferior courts. It was also contended, that the legislature could not pass such a law for a particular case, that all laws must be of a general nature and operation, in relation to rights and property. In answer to this position, it was held, it would not be contended that the legislative department might not establish all such rules in relation to rights, property, the rules of descent, the power and mode of disposing of and securing such rights, and of evidence to establish them, that they might deem expedient and needful for the public good, so that they take away from the citizen no rights which he possessed, or if taken for the public use that the consent of the representatives be first obtained, and a just compensation made. They might so change the law of descents as to cut off all our expectations of inheritance, and confer it upon a single child, and might deny the power of

(*a*) *Edwards* v. *Pope et al.* 3 Scam. R. 465.

disposition by will, so as to prevent the bounty of our parents. They might so change the rules of evidence as to make it difficult to establish our rights. They might limit the time of suit, as that when elapsed, to deny us all remedy to enforce those rights. And yet, in all these cases, and the like, not violate that great fundamental law. The power of the legislature was limited and restrained by the constitution within the bounds prescribed by that instrument. It was not the mode of exercising the power, but the right, that was denied by the constitution. If the thing to be done, the right to be secured, and the mode of securing that right, and doing that act, be within legislative competency, the manner of the legislative exercise of that power was not restrained by the constitution. By the "mode and manner," reference was had to general or special legislation, and not to the readings of the bills in the several legislative departments, and their approval by the executive. Although *Magna Charta* was not a paramount law to the power of parliament, yet it contained a declaration of the great and fundamental rights of freemen, which parliament would not violate, notwithstanding its omnipotence, according to Blackstone. Parliament had, since the reign of Edward the first, before and since Magna Charta, passed private acts, upon the petition of individuals for relief in private affairs; and it had long since become one of the common assurances of title in the kingdom. And parliament exercised this power under circumstances enabling a person to acquire an absolute title to realty, where by the deeds, will, or settlements, he was only entitled to an estate tail, but capable of being converted into a fee by fine and recovery. Thus, it would be seen, that the exercise of this power by parliament was not confined to those cases in which the party had no relief under the general laws, but was exercised in those cases where, by the general laws, the

same end could be accomplished. It had passed acts for enclosing particular commons. But the mode of passing the act was much more cautious and circumspect than here. All the parties in interest either presented the petition or they expressly consented, and it was referred to two judges to hear the proofs, and draw a bill, which was again referred to a committee, and proofs heard. Consent was expressly required from all interested, unless perversely withheld; or if incapable of giving it, on account of infancy, lunacy, &c., an equivalent must be given them. Nearly all the states had constitutions with provisions similar to the one under consideration. Contemporaneous and uniform constructions would assist in the sound interpretation of constitutions and laws. These might be found in the private acts upon the statute books of the several states. It held, that the legislature might, therefore, exercise its legitimate powers by enacting general or especial laws. It was unquestionable that the legislature had power to subject all real and personal estate to sale for payment of debts, either by the creditor's having first established his debt before a judicial tribunal, or by officers appointed by law. If the legislature had the power to declare what should be lawful age at which minority should cease, and an individual should be capable of consenting or conveying, might it not also declare a particular minor capable of conveying during minority? Or, if application be made on his behalf for relief, might it not by special law give that consent for him; or by giving power to his friend to convey for him? The opposition to such laws seemed to be on the ground, that the legislature acted contrary to the wishes and interest, and in violation of rights so circumstanced. But the truth was, these are intended to be, and are, remedial acts to effectuate the common rights of all, according to the constitution and legal powers of the government.

The laws of descent might be so changed, as that the land should descend to the administrator, until all creditors were satisfied. The lands, it is true, are to descend to and absolutely vest in the heirs, and that it was a divestiture of their inheritance, under our laws subjecting their inheritance to the payment of debts; but that descent to, and seizure of the heir, was only a vested right *sub modo*, subject to be divested by a deficiency of assets. It was difficult to lay down any general rule distinguishing between legislative and judicial acts; between what the legislature might rightfully do, and what would be an infringement of private right, or a disturbance of vested interest to do.

§ 355. It has been held by the supreme court of the United States, that an act of the legislature of the state of Rhode Island passed in 1792, which confirmed a sale and conveyance of lands which had been made by an executor, under a license from a probate court in another state, was not an act of judicial authority.(*a*) Judge Story, in answer to the position that it was an act of judicial authority, which the legislature was not competent to exercise at all; or if it could exercise it, it could only be after due notice to all the parties in interest, and a hearing and decree, said: "We do not think that the act is to be considered as a judicial act; but as an exercise of legislation. It purports to be a legislative resolution, and not a decree. As to notice, if it were necessary, (and it certainly would be wise and convenient to give notice, where extraordinary efforts of legislation are resorted to which touch private rights,) it might well be presumed, after a lapse of more than thirty years, and the acquiescence of the parties for the same period,

(*a*) *Wilkeson* v. *Leland*, 2 Pet. R. 660.

that such notice was actually given. But by the general laws of Rhode Island upon this subject, no notice is required to be, or is in practice, given to heirs or devisees, in cases of sales of this nature; and it would be strange if the legislature might not do, without notice, the same act which it would delegate authority to another to do without notice. If the legislature had authorized a future sale by the executrix for the payment of debts, it is not easy to perceive any sound objection to it. There is nothing in the nature of the act which requires that it should be performed by a judicial tribunal, or that it should be performed by a delegate instead of the legislature. It is remedial in its nature to give effect to existing rights."

§ 356. In *Rice et al.* v. *Parkman*,(*a*) it was held that the legislature had power to license the sale of the real estate of minors, notwithstanding they had delegated the same power to the judicial courts. It was in this case conceded by Parker, Ch. J., that if the powers by which the resolve authorizing the sale was passed, were of a judicial nature, it was clear that they could not be exercised by the legislature. But that it was not of this description, as it was not a case of controversy between party and party, nor was it a decree or judgment affecting the title to property. The object of the authority granted by the legislature, was to transmute real into personal estate, for purposes beneficial to all who were interested therein. This power had been frequently exercised by the legislature of the province and of the colony, while under the sovereignty of Great Britain, analogous to the power exercised by the British parliament on similar subjects, time out of mind. It was absolutely necessary for the interest of those who, by the

(*a*) 16 Mass. R. 326.

general rules of law, were incompetent to dispose of their property. This power must rest in the legislature; that body being competent to act as the general guardian and protector of those who were disabled to act for themselves. It did not follow, because the power had been delegated by the legislature to courts of law, it was judicial in its character. It was doubtless included in the general authority granted by the people to the legislature in the constitution. For full power and authority was given from time to time to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and institutions, as they should judge to be for the good and welfare of the commonwealth, and for the subjects thereof.

§ 357. In Connecticut an act of the legislature passed upon the application of a wife, alleging criminal intimacies of her husband with another woman, not amounting to adultery, which found the fact alleged, and absolved the petitioner from all obligation by virtue of the marriage, was held not to be an assumption of judicial powers by the legislature, so as to render the act unconstitutional. This case was resisted on the ground, that by the constitution of 1818, there was an entire separation of the legislative and judicial departments, and that the legislature could not now pass an act or resolution not clearly warranted by the constitution. That the constitution was a grant of power, and not a limitation of power already possessed. In short, that there was no reserved power in the legislature since the adoption of this constitution. Chief Justice Daggett, in answer to this argument, held, that precisely the opposite of this was true. From the settlement of the state there had been certain fundamental rules, by which power had been exercised. These rules were embodied in an instrument, called by some a constitution, by others a

charter. All agreed, that it was the first constitution ever made in Connecticut, and made too, by the people themselves. It gave extensive powers to the legislature, and left too much, (for it left every thing almost,) to their will. The constitution of 1818, professed to, and in fact did limit that will. It adopted certain general principles, by a preamble, called a declaration of rights; provided for the election and appointment of certain agents of government, such as the legislative, executive and judicial departments, and imposed upon them certain restraints. It found the state sovereign and independent, with a legislative power capable of making all laws necessary for the good of the people, not forbidden by the constitution of the United States, nor opposed to the sound maxims of legislation; and it left them in the same condition, except so far as limitations were provided. There was then, and had been, a law in force, on the subject of divorces, for one hundred and thirty years. It provided for divorces *a vinculo matrimonii*, in four cases, viz: adultery, fraudulent contract, wilful desertion, and seven years' absence unheard of. The law had remained in substance the same as it was when enacted in 1667. During all this period, the legislature had interposed, like the parliament of Great Britain, and passed special acts of divorce *a vinculo matrimonii*, and at almost every session since the constitution of the United States went into operation, then forty-two years, and for thirteen years of the existence of the constitution of Connecticut, such acts had been, in multiplied cases, passed and sanctioned by the constituted authorities of the state. The court were not at liberty to inquire into the wisdom of the existing laws on that subject, nor into the expediency of such frequent interference by the legislature. They were only to inquire into the constitutionality of the act under consideration. The power was not prohibited either by the constitution of the

United States, or of that state. In view of the appalling consequences of declaring the general law of the state, or the respective acts of the legislature, unconstitutional and void—consequences easily conceived, but not easily expressed—such as bastardizing the issue, and subjecting the parties to punishment for adultery—the court should come to the result only on a solemn conviction that their oaths of office and the constitution imperiously demand it. Feeling no such conviction, for one he could not pronounce the act void. In this case, Mr. Justice Peters said: "Upon general principles, he had no doubt that the act of divorce in this case was repugnant to the constitution of the United States, as impairing the obligation of a contract; and that it was void under the constitution of this state, as an assumption of judicial power by the legislature. But in view of decisions in analogous cases, and of the appalling consequences of nullifying all legislative acts of divorce, he should acquiesce in the opinion of the court."

§ 358. In reference to acts of the nature we have been considering, each act must depend upon its peculiar phraseology and provisions. The court will look to the particular circumstances of the parties applying for, and to be affected by it, as well as their intention, and the intention of the legislature, and the object to be accomplished. If from these, it be manifest that the legislature has but exercised a remedial power, in enabling the parties to do with their own property what they had not power before to do, and that it has not adjudicated that they should do what they were unwilling to do, such acts will be deemed within legislative competency.(*a*)

§ 359. There is another class of cases which it is proper we should consider in this connection. In the

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(*a*) *Edwards* v. *Pope et al.*, 3 Scam. R. 473.

case of *Holden* v. *Jame's Administrator*,(*a*) the statute of limitation had run against the plaintiff's demand. Upon his petition to the legislature, an act was passed authorizing him to commence and prosecute his suit, "In the same manner as he might or could have done, if the same had been commenced within the time prescribed by law;" and the court was authorized to give judgment, any thing in any law to the contrary notwithstanding. This power of dispensing with, and suspending the general laws for particular cases, and authorizing judgment *non obstante* any statute, was held to be unconstitutional.(*b*)

§ 360. In Maine, Vermont, and New Hampshire, it has been repeatedly held, that the legislature could not constitutionally pass an act granting an appeal, or a review, or a new trial, in any case between private persons.(*c*) In the state of Maine the legislature, in 1824, passed an act granting an appeal from a decree theretofore made by the judge of probate, and directing the judge of probate to allow, and the supreme court to sustain, proceed, and decree in the same in the like manner as if the appeal had been claimed and granted pursuant to an existing law on the day of making the decree. The constitutionality of this act came in question in the case of *Lewis et al.* v. *Webb*, above cited. One point made was, that it was a judicial act, and therefore transcended the powers of the legislature, to which this authority was expressly interdicted by art. 3, secs. 1, 2, of the constitution of Maine. In the decision of this question, Mellen, Ch. J., said: "What is the nature of the

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(*a*) 11 Mass. R. 400.

(*b*) See also, *Lyman* v. *Mower*, 2 Vt. R. 517. *Ward* v. *Barnard*, 1 Aik. R. 121.

(*c*) *Lewis* v. *Webb*, 3 Greenl. R. 326. *Dunham* v. *Lewiston*, 4 Greenl. R. 140. *Bates* v. *Kimball*, 2 Chip. R. 77. *Staniford* v. *Barry*, 1 Aik. R. 314.

power exercised by the legislature in passing said resolve, is it of a legislative or judicial character?" In answering this inquiry he held: The terms used in the first section, as to three departments of government, were general, and the phraseology of the second section, prohibiting the interference of the departments, was also general. Hence, as in the instance then before the court, a question arose; what exercise of power by those belonging to one department is to be considered as an invasion of the province of either of the other departments? In reply to this, it might be said at once, that if the legislature undertake to exercise judicial power, they invade the province of the judiciary, because the constitution and the laws had placed all the judicial power in other hands. But the question returns; did the legislature exercise a judicial power in granting to the appellants the right of appeal? In form they did not; but if it was such in substance and effect, it would clearly be a violation of the spirit if not of the very language of the constitution. Whatever might be considered the nature and character of the decree, since the appeal was claimed, it was very clear, that at the time the legislature passed the resolve, it was in full force and virtue, and had been for almost five years. The rights of heirs or creditors in the subject matter of that decree vested when it was passed, and so remained undisturbed until the resolve professed to grant the appellants leave to disturb them. The ordinary and legal consequence of an appeal was to vacate at once the judgment or decree appealed from; had that effect been produced in the present instance? Or was the decree of the judge of probate in full force then, and the administrator liable to have a second decree passed against him by the court on the same account? Such a decree passed by the court would not operate to relieve the administrator from the effect of the existing decree, unless the resolve and the appeal claimed

in virtue of it, had completely vacated that decree; and if it was not vacated thereby why was it not a bar to all proceedings in court when relied upon as such? In fact, this appeal could not be sustained on any other principles than that of its having produced the usual effect of an ordinary appeal; that was, having vacated the decree below. Could the legislature, by a mere resolve, set aside a judgment or decree of a judicial court, and render it null and void? This was an exercise of power common in courts of law, a power not questioned, but it was one purely judicial in its nature and its consequences. It was one of the striking and peculiar features of judicial power, that it was displayed in the decision of controversies between contending parties, the settlement of their rights, and redress of their wrongs. But it was urged that the resolve was not liable to objection on constitutional ground; that the resolve went no further than to authorize a re-examination of the cause, to empower one judicial court to review the proceedings of another judicial court, by way of appeal, and thus do complete and final justice to all concerned. It was true, the resolve did not, in terms, purport to transfer property directly from one man to another by mere legislative authority; but it professed to grant to one party in a cause which had been, according to existing laws, finally decided, especial authority to compel the other party, contrary to the general law of the land, to submit his cause to another court for trial, the consequence of which might be the total loss of all those rights, and all that property, which the judgment complained of had entitled him to hold and enjoy; that is to say, it professed to accomplish, in an indirect and circuitous manner, that which the existing laws forbid, and which, by a direct and legal course could not be obtained; and to perform an act respecting a cause between party and party; an act, therefore, of a judicial character, in the simple form

of legislation. Such a law could not be reasonable within the meaning of that term, as used in the constitution in the grant of legislative power. There was some harmony between the principles of morality and those of the constitution and the common law. It was the province of the legislature to make and establish laws; and it was the province and duty of judges to expound and apply them. There was no occasion for this species of particular legislative interposition. The cause of justice did not require it, if the general law which gave authority to the judicial courts to grant reviews in special cases, was not sufficiently comprehensive in its terms or provisions, let this discretionary jurisdiction be enlarged, so as to embrace all those cases where a new trial ought to be had; but all the citizens should be placed on the same level; and discuss the merits of their application before those tribunals, where facts can be investigated and principles uniformly applied; in that forum where, if a review should be granted, the cause would undergo its final investigation and decision. The genius of our government, and the nature of our civil institutions, were such as to render it most proper that all questions between litigating parties should be discussed and decided in a judicial court; there was the place to settle questions of law, and though they had often been presented to the legislature for their determination, in the form of applications for new trials, nothing but a familiarity with this mode of proceeding prevented perceiving at once its impropriety and violation of the spirit of constitutional provisions.

§ 361. In another case in the same state, the question arose whether the legislature of the state had authority by the constitution to grant a review of a suit between private citizens.(*a*) In that case it was argued, that

(*a*) *The Inhabitants of Durham* v. *Lewiston*, 4 Greenl. R. 140.

there was no limit to the power of the state legislature except what was imposed by the constitution of the state, and of the United States. Whatever authority it possessed was transcendental. Notwithstanding the theoretic division of powers, a practical line of demarcation was to be settled. The constitution did not attempt to define the judicial authority, but left it to be ordained and distributed by the legislature, and to be parcelled out in such portions as it might see fit, in its general discretionary superintendence over the municipal concerns of the community. The *residuum* of such power remained by the necessary constitution of the state in the legislature. Having no court of chancery jurisdiction, the legislature necessarily possessed some chancery powers: and these powers extended to granting relief in all cases of accident, mistake, and hardship. That this case was clearly distinguishable from that of *Lewis* v. *Webb*, which was a case of appeal. Almost the whole jurisdiction of the court was appellate, and the statutes regulating appeals required them to be pursued within limited periods, after which the rights inevitably lapsed, and could not be revived consistent with the rights of the adverse party, which had become vested by commission. Hence, in that case, an act of the legislature to grant an appeal from a final judgment, might amount to an act to vacate such judgment, but reviews stood on a different footing. In reply to this argument, the court said: "One object of the counsel had been to distinguish this case from that of *Lewis* v. *Webb*, in respect to the constitutional authority of the legislature to pass the resolve in question, and give it its intended operation. The soundness of that decision was not questioned; but as the two cases in some respects were different, they had attentively listened to the arguments, that they might become satisfied whether there was any difference of such a character as to leave the present case unaf-

fected by that decision; and after mature consideration, they were all satisfied there was no such distinction;" and on this ground they held the act unconstitutional.

§ 362. In the state of Vermont, K. had taken out letters of administration on the estate, B. represented to be insolvent, commissioners had been appointed by the court of probate to receive, examine and adjust the claims of creditors, who adjudged a claim of $596 20 in favor of B. which was returned to the court, and it was allowed and ordered recorded. K. omitted to appeal in the time allowed by law. Subsequently the legislature on his petition passed a special act allowing him to appeal from the report of the commissioners. The constitutionality of this act came under review in the case of *Bates* v. *Kimball*, above cited, and it was held to be unconstitutional. Aiken, J., in deciding this question, took the position, that to determine whether the act be constitutional or not, it became necessary to ascertain the character of the subject matter to be affected by it, as well as the consequences or effect of the act itself. When the estate of a deceased person was represented insolvent, commissioners were to be appointed to receive, examine, and adjust all claims of the creditors to such estate. They were the only board known to the law having original cognizance of demands thus situated. Their determination when approved by the probate courts became a matter of record. The demand, thenceforth, was a debt of record; and was final between the parties, except in cases where an appeal was taken. A judgment not appealed from, within the time allowed by law for taking the appeal, was thenceforth of the same effect as though no appeal were by law allowed, and was a final judgment. Such was the plaintiff's cause of action, upon which the present suit was brought. By the act in question, the defendant was authorized to enter an appeal from the decision of the commissioners,

to the present session of the court: and it was thereby further commanded that the proceedings, both before the court of probate and this court, should be in all respects the same as though the defendant had entered his appeal within the time allowed by the law. This act, in the first instance, altered the decision of the commissioners from a final and absolute judgment upon the merits, to a judgment *nisi;* or, in other words, to a judgment liable to be vacated by the act of the party in entering his appeal: and, secondly, through the authorized act of the party on entering his appeal, it altered it to a judgment vacated. That a judgment appealed from was a judgment vacated, was evident from the fact, that by the appeal the parties were thrown back upon the original cause of action, and were compelled to litigate anew, that which would otherwise be concluded by the judgment itself. Again, it could never be enforced as a judgment of the same court whence the appeal was taken, though the appeal be not carried up. If the appellee did not, on the neglect of the appellant to prosecute his appeal, procure an affirmance by the court to which the appeal was taken, he lost the benefit of his judgment forever, and must resort to a new suit for his remedy. That the subject matter of this act, was a final judgment of record between party and party, rendered by a board, and approved by a court of competent jurisdiction for that purpose; and that the effect and operation of the act was virtually to vacate that judgment. The real question, therefore, was, had the legislature power to vacate or annul an existing judgment between party and party? The doctrine that all power was originally in the government, and that the people by their charters and constitutions had abridged and limited those powers, was fit only for those countries where the ignorance of the people was the weapon by which the lawless power maintained her throne. The

axiom that the sovereignty was in the people, was a political truth on which every free and rational government was founded. Its development had regenerated the nations of this western hemisphere, and again re-illuminated the long benighted but classical land of Greece. When the people associated and entered into compact for the purpose of establishing government, that compact, whatever might be its provisions, or in whatever language it might be written, was the constitution of the state, revocable only by the people, or in the manner they prescribed. It was by this instrument that government was instituted; its departments created, and the powers to be exercised by each confined. The powers thus conferred by the constitution of this country, must be found expressed in the constitution, or be derived by a just and necessary implication from the expressions used. But power which was expressly delegated to one department, could never be devised to another by implication, because no necessity for such implication could justly be pretended. The necessity of a distinct and separate existence of three great departments of government, was well understood by the people at the time of the adoption of the constitution. Its importance to the security of public liberty and private right, had been proclaimed and enforced by some of the wisest and most eminent men of other countries, and of this; among whom were Montesquieu, Sir William Blackstone, Jefferson, and Madison. It had been sanctioned by the people of the United States by being adopted, in more or less explicit terms, into all their written constitutions. The constitution of Vermont had declared "That the legislative, executive, and judiciary departments shall be separate and distinct, so that neither shall exercise the powers belonging to the other." Whatever, therefore, it properly belonged to the judiciary to do, the legislature were expressly precluded from doing. The legis-

lature had the power by general laws to establish the courts, to appoint and limit their respective jurisdiction; to prescribe the mode in which causes should be brought before them; to enlarge or restrict the power of granting appeals, reviews and new trials, and otherwise to regulate their proceedings, so that every person can find a certain remedy by having recourse to them for all injuries and wrongs, was readily admitted. But when they had done this, they had exercised every power relating to the administration of justice "necessary for the legislature of a free and independent state." This was the extent of the powers of this description vested in that body by the constitution, except indeed certain judicial powers expressly delegated to them touching the conduct and privileges of their own members. It was true the constitution had no where particularly defined what those powers were, which properly belong to the judiciary department; but from sections four and six we learned that by the judiciary department was meant courts of justice. These powers then must be such as were usually exercised by courts in the trial of causes, and the administration of justice; to ascertain them, we must necessarily resort to the common law and usage, in manifest reference to which the constitution was framed. The effect of this act was to vacate a judgment and direct another trial in matters determined by that judgment. It was immaterial whether that effect was produced by authorizing an extraordinary appeal in a case not within, and of course not "conformably to the law," or whether it was done by ordering a new trial before the same court, the mischief was the same. It was not by the mode of doing a thing, nor by the pretended capacity in which it was done, but by the nature of the act itself, that its propriety or impropriety was to be determined. The common law and usage referred us in view of these proceedings, to the judiciary depart-

ment. The granting of a new trial, after the verdict and before judgment, was a part of the ordinary administration of justice in all common law courts, and was essential to the support and proper exercise of the right of trial by jury.

§ 363. In *Staniford* v. *Barry*, the same court affirmed the same doctrine, and held, that the validity of such an act had been discussed in the case of *Bates* v. *Kimball*, and that this question must be considered as settled by that decision. The court said, "It was there determined, that the judgment of commissioners, appointed to receive and examine claims on an estate represented insolvent, unless appealed from within the time prescribed by law, was a final judgment, which fixed the rights of the parties, and could not be vacated or set aside by an act of the legislature. That decision was a direct authority that the act, under which this appeal was taken, is unconstitutional and void, as being an exercise of power by the legislature properly belonging to the judiciary, and as being in the nature of a sentence, or decree, rather than a law, wholly retrospective in its operation, and taking away a vested right. The case referred to has been maturely considered, and was decided on principles and authorities which are conclusive on the question. It is unnecessary, therefore, to enter at large into the question at this time. We have only to add, that the principles adopted in the case cited, have become settled constitutional law, and are universally recognized and acted upon as such by all judicial tribunals in this country. They are found in the doctrines of learned civilians and the decisions of able judges, without a single decision or even opinion or dictum to the contrary. They not only grow out of the letter and spirit of the constitution, but are founded in the very nature of a free government, and are absolutely essential

to the preservation of civil liberty and permanent security of rights."

§ 364. In New Hampshire an act of the legislature awarding a new trial in an action which had been decided in a court of law, was held to be an exercise of judicial powers, as the legislature was not, by the constitution, a part of the judiciary, and could not perform any judiciary act.(*a*) The court in this case took the position, that no article in the constitution could be designated which, in specific terms, made the legislature a branch of the judiciary, consequently, if they were, it must depend upon inference, and that inference, it was admitted, could be drawn from nothing but the grant of powers to the general court, and from the 31st and 37th article of the bill of rights. By that grant they were invested "with full authority to make all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions and institutions, either with penalties or without, so as the same be not repugnant or contrary to this constitution." But nothing was said of decrees or judgments, or judicial power. The phraseology was altogether peculiar to *legislative* subjects. Though styled the "General Court of New Hampshire," they were considered in the first section to be "the supreme legislative power." The constitution then proceeds to state, not that the general court shall be a branch of the judiciary, but that "they shall forever have power and authority to erect and constitute judicatures;" not that they themselves shall hear any private controversies, but that the courts of record, so constituted, shall be holden in the name of the state, for hearing such causes.

§ 365. In *Calder* v. *Bull*(*b*) the Supreme Court of the

(*a*) *Merill* v. *Sherbrun et al.* 1 N. H. R. 206.

(*b*) 3 Dallas R. 386.

United States held, that an act of the legislature of Connecticut, granting a new trial, after the time for appealing had elapsed, was constitutional, although the act was judicial in its nature. It has by some been supposed that this decision was inconsistent with the decisions in New Hampshire, Maine, and Vermont, above referred to, and that the doctrine of those cases had been virtually overruled. We apprehend, however, such is not the fact. The decision in that case was placed upon the ground, that it was the usage in that state so to legislate, which was to be taken as evidence of the fundamental law, it at that time having no written constitution. Mr. Justice Patterson, in his opinion, puts the case on that distinct ground. He held, the constitution of Connecticut was made up of usages, and it appeared that its legislature had, from the beginning, exercised the power of granting new trials. This had been uniformly the case till the year 1762, when this power was, by legislative act, imparted to the superior and county courts. But the act did not remove or annihilate the pre-existing power of the legislature in this particular, it only communicated to other authorities a concurrence of jurisdiction, as to the awarding of new trials. And the fact was, that the legislature had, in two instances, exercised this power since the passage of the law of 1762. They acted in a double capacity; as a house of legislation, with undefined authority, and also as a court of judicature in certain exigencies. Whether the latter arose from the indefinite nature of legislative powers, or in some other way, it was not necessary to discuss. From the best information which he had been able to collect on this subject, it appeared that the legislature, or general court of Connecticut, originally possessed and exercised all legislative, executive, and judicial authority; and that from time to time they dis-

tributed the two latter in such manner as they thought proper, but without parting with the general superintending power, or the right of exercising the same whenever they should judge it expedient. It was sufficient that they had, on certain occasions, exercised judicial authority from the commencement of their civil polity. This usage made up part of the constitution of Connecticut, and the court were bound to consider it as such, unless it was inconsistent with the constitution of the United States. True it was, that the awarding of new trials fell properly within the province of the judiciary, but if the legislature of Connecticut had been in the uninterrupted exercise of this authority in certain cases, the court must, in such cases, respect their decisions, as flowing from competent jurisdiction or constitutional organ. They might, in the present instance, consider the legislature of the state as having acted in their customary judicial capacity, if so, that was an end of the question. For, if the power thus exercised came more properly within the description of a judicial than of a legislative power, and if by usage or the constitution, which in Connecticut were synonymous terms, the legislature of that state acted in both capacities; then, in the case before the court, it would be fair to consider the awarding of a new trial as an act emanating from the judiciary side of the department. The decision in that case was also put on the same ground by the court in Connecticut.(*a*)

§ 366. We have in a previous chapter considered the nature of retrospective laws, and have endeavored to show, that the legislature, irrespective of any constitutional restriction, cannot pass such laws having a retroactive effect, affecting vested rights, in the legitimate

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(*a*) 2 Root's R. 350.

exercise of its constitutional powers.(*a*) We are next to consider what acts are and what acts are not deemed retrospective, within the meaning of constitutional restrictions upon legislative power, in this particular. The constitution of New Hampshire declares, "Retrospective laws are highly injurious, oppressive and unjust. No such law, therefore, should be made, either for the decision of civil causes or the punishment of offences."(*b*)

§ 367. Under this clause in the constitution, it has been determined that a retrospective law for the punishment of an offence, within the meaning of this clause, was one which was made to punish an act previously done, or to increase the punishment of such act, or in some way to change the rule of law in relation to its punishment, to the prejudice of him who committed it. In other words, it was such a law as would, under the inhibition against *ex post facto* laws, be deemed strictly *ex post facto*. It must be a law establishing a new rule for the punishment of an act already done. The object of this clause was to protect individuals against unjust and oppressive punishment. On the one hand, it inhibited the power to make laws retroactive for the punishment of offences, and on the other, leaves uninhibited the power to make all such laws as it should deem expedient to mitigate the degree of punishment to be inflicted.(*c*)

§ 368. The question has arisen as to what is a "retrospective law made for the decision of civil causes," within the meaning of this clause. The language in this clause is far more broad and comprehensive than that used in the preceding clause. The former seems designed only for the protection of one of the parties, that is, the citizen; the latter is designed for the protection

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(*a*) See ante, § 149, *et sequitur*.

(*b*) Ante, § 82, p. 127.

(*c*) *Wourt* v. *Winnick*, 3 N. H. R. 476.

of both parties to a civil action. It protects both parties from any interference of the legislature whatever, in any civil cause, by a retrospective law. A law for the decision of a cause is a law prescribing the rules by which it is to be decided—a law enacting the general principles by which the decision is to be governed. A retrospective law for the decision of civil causes, is a law prescribing the rules by which existing causes are to be decided, upon facts existing previous to the making of the law. Instead of being rules for the decision of civil causes, as laws are in their very essence, retrospective laws for the decision of civil causes are, in their nature, a *judicial* determination of the rules, by which existing causes shall be settled, upon existing facts. They may relate to the grounds of the action, or the grounds of the defence, both of which it seems are equally protected by this clause. On the one hand, it is not within the constitutional competency of the legislature to annul by statute, any legal ground, on which a pending action is founded, or to create any new bar, by which such action may be defeated; on the other hand, no new ground for the support of an existing action can be created by statute, nor any legal bar to any such action be taken away. A statute which attempts either of the above things is a retrospective law for the decision of civil causes, within the prohibition of this article in the bill of rights.(*a*)

§ 369. Richardson, Ch. J., in the case last cited, speaking of this clause, says; "It was intended to prohibit the making of any law prescribing new rules for the decision of existing causes, so as to change the ground of the action, or the nature of the defence. We think that such was the intention, because it was fit and proper that the prohibition should go to that extent. Retro-

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(*a*) *Woart* v. *Winnick*, 3 N. H. R. 477.

spective laws of that kind deserved to be denounced, as they are denounced in our constitution, as highly injurious, oppressive, and unjust. They have been denounced by the most sound and intelligent jurists and statesmen in every age. We think that such was the intention, because the establishment of new rules for the decision of existing cases, is in its nature an exercise of judicial power, a power which the 37th article of the bill of rights declares ought to be kept separate from, and independent of, the legislative power; and because the union of the legislative and judicial power in the same branch of government is, in its essence, tyranny. We think such was the intention, because it is most manifestly injurious, oppressive, and unjust, that after an individual has, upon the faith of existing laws, brought his action, or prepared his defence, the legislature should step in, and, without any examination of the circumstances of the case, arbitrarily repeal the law upon which the action or defence has been rested. Such an exercise of power is, in our opinion, wholly irreconcilable with the spirit of our institutions, and with the great principles of freedom, upon which they are founded."

§ 370. In the case last cited it was held, that an act of the legislature repealing a statute of limitation, with respect to all actions pending at the time of the repeal, and which were barred by the statute, was a retrospective law for the trial of civil causes, and repugnant to the constitution of New Hampshire, and hence wholly inoperative. In another case,(*a*) a statute, purporting to grant a new trial in a civil cause, after a final judgment had been rendered, was held to be a retrospective law, within the meaning of this clause in the bill of rights.

§ 371. In the case of the *Society, &c.* v. *Wheeler et*

(*a*) *Merrill* v. *Sherburne*, 1 N. H. R. 199.

al.,(*a*) an act of the legislature of New Hampshire, of 1805, was held retrospective and unconstitutional, which provided, "That when any action shall be brought against any person for the recovery of any lands or tenements which such person holds by virtue of a supposed legal title, under a *bona fide* purchase, and which the occupant, or the person under whom he claims, has been in the actual possession and improvement of, for more than six years before the commencement of the action the jury who try the action, if they find a verdict for the plaintiff, shall inquire, and by their verdict ascertain, the increased value of the premises by virtue of the buildings and improvements made by such person or persons, or those under whom he or they claim, and no writ of seisin or possession shall issue upon such judgment, until such plaintiff shall have paid into the hands of the clerk of said court, for the use of the defendant, or person or persons justly entitled thereto, such sum as said jury shall assess as aforesaid, which sum shall be paid to the clerk within one year after the verdict rendered by the jury, otherwise no writ of possession shall issue."

§ 372. Mr. Justice Story, after laying down the rule that "every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective," placed his decision in the case last cited on the ground, that before the passage of the act, the demandants had a clear vested right and title in the demanded premises in fee, absolute and unconditional; and although the seisin was in another, yet the existing laws afforded a complete remedy to perfect that title by an union *juris et seisinæ*, under judi-

(*a*) 2 Gallison R. 105.

cial process. They were also entitled, both at law and equity, not only to the land, but to all the improvements thereon which were annexed to the freehold, by whomsoever made, under that vested right and title. The law imputed no laches to them for not pursuing their legal remedy to recover seisin, for the time of the statute of limitations had not run against them; and it imposed no obligation to pay for any amelioration of the soil, or any erections which had been made by any person claiming on adverse possession or seisin. Thus the act found them, and it took effect immediately. That the action was brought in 1807, and if the tenants claimed that the act applied to this action, it must be upon the ground that the six years' possession under a supposed legal title, was to be calculated backwards from the time of the commencement of the action, although that time should not have elapsed after the date of the act. In this view, the arguments to support its constitutionality must be the same as though the action were commenced immediately after the passage of the act. It might be admitted that if this were a statute of limitations, barring real actions within a reasonable time, under the exercise of legislative discretion, its constitutionality could not be doubted. And if the state had declared, that if the party should for six years after the passing of the act, or for six years after any ouster or *disseisin in futuro*, neglect to pursue his remedy for the recovery of his right, then that the remedy should only be had upon the terms of the act, it might perhaps have fallen under the same consideration; for it would in effect be only a rigorous statute of limitations. But if the legislature were to pass an act of limitations, by which all actions upon past disseisins were to be bound, without any allowance for time for the commencement thereof *in futuro*, it would be difficult to support its constitutionality, for it would be completely retrospective in its operation

on vested rights.(*a*) But the statute then under consideration, could not be regarded as a statute merely regulating the remedy, and prescribing the mode and time of proceeding. It conferred an absolute right to compensation on one side, and a corresponding liability on the other, if the party would enforce his previously vested title to the lands. And unless he should comply within a given time, his title, or what is in effect the same thing, his remedy, was completely extinguished. It was not therefore in form, or in substance, a modification of the remedy, but a direct extinguishment of a vested right in all the improvements and erections on the land, which were annexed to the freehold. It directly impaired the value of the vested right of the party in the land itself, inasmuch as it impaired the remedy, and subjected the party to burthens which might render the right not worth pursuing; and that too, upon past considerations, respecting which the party had incurred no legal obligation, and had imputed to him no legal laches. If indeed, it ought to be the very essence of a new law that it is to be a rule for future cases, and that it is against natural justice to apply it to past cases, it would seem to follow that an act which worked the effect which had been stated, ought to be deemed a retrospective law, within the prohibition of the constitution of New Hampshire, for it was a law for the decision of a civil cause, which affected past cases, and had a retroactive operation.

§ 373. The bill of rights of Tennessee declares, "That no retrospective law, or law impairing the obligation of contracts, shall be made." It has been held in that state, that an act of the legislature, which authorized an indi-

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(*a*) See also, *Call* v. *Hagger*, 8 Mass. R. 423. *The Proprietors of Kennebeck Purchase* v. *Laboree*, 2 Greenl. R. 293.

vidual to prosecute a suit pending in the name of two other persons, one of whom was deceased, without taking out letters of administration upon the estate of the deceased, was within this clause of the constitution.(*a*) It was determined in that case, that any act of the legislature which was retrospective in its operations, which took away from some vested rights, and gave them to others, that changed the nature of obligations, and dispensed with liabilities that all others would be under in a similar situation, or that was partial in its operation, giving one individual privileges that were not extended to others, contrary to the general law, was unconstitutional. The court said, "The law as it exists at the time of the death of a member of society fixes the rights of the parties; these rights should be uniform; laches or accident may be the cause of a loss of a right which one more vigilant might save. This did not arise from the defect of law, but it may arise from the neglect or misfortune of one claiming the benefit of it. It should be the business of the judge to see that the scales of justice be held with an even hand. An interference with the uniform administration of justice, directing that administration aside from uniformity, so as to give to one man rights which must be denied to another, would at once be subversive of the liberty and security guaranteed by the constitution. This would be emphatically the case, if any power but the court was permitted to direct at pleasure the rule and measure of justice, in specified cases. Who would be safe if the legislature were permitted to dictate the decision of causes pending? What would be the use of courts under such a state of things? They would be mere instruments in the hands of others;

(*a*) *Officer* v. *Young*, 5 Yerger's R. 320.

and all their powers and usefulness would be paralysed. They might make records and issue process; but their mind and independence would be gone; and with these would also go responsibility; for if the agent be not free to act, there should not be accountability; hence arises the great necessity of courts looking to their own constitutional rights and powers, and firmly disregarding all attempts at innovation upon them. Admit the principle that the legislature at pleasure can take from or add parties in causes pending, and how can the court look forward to results? The obligation of the judge, 'that he will do equal law and right to all persons;' that he will delay no one of common right, by reason of any command from any person or persons in authority, or for other cause whatever; but that he will faithfully, truly and justly do equal and impartial justice to individuals and the public; are the great and mighty barriers to all encroachment upon that administration of justice, which puts citizen upon an equal footing with citizen. Who on the death of Elrod became instantly interested in the subject matter litigated in this suit? The widow, the heirs, and creditors of the deceased, had a direct interest; an interest which a law uniform in its operation, fixed and established. To settle the interests of all, needed no legislation. The way was plain, and it was for the court to see that it was properly pursued. What is the attempt made? To disregard the rules which were general; make an excepted case of the present; substitute a person not known to the law of the land, and permit him without responsibility to stand in the place of Peter Elrod, and prosecute the suit. It is asked, what section of the constitution has been violated by the act in question? It is answer enough to say, that the act takes away from some their vested rights, and gives them to others; changes the nature of obligations, and dispenses with the liabilities which all others in similar situations would

lie under. There is no aspect in which it can be viewed, that does not present a strange anomaly, alike conflicting with the sworn duty of the judge, the vested rights of persons, and the constitution. What is the difference between such a course, and appointing a judge over the head of the legitimate and constitutional one, to decide the cause? None can be perceived in principle; though, in fact, the consequences, in the case before us, may be most injurious and fatal to rights."

§ 374. In *Wally's Heirs* v. *Kennedy*(*a*) it was made a question, whether an act which declared that certain suits should be barred if it was proved that it was prosecuted in trust for another, was within this constitutional restriction respecting retrospective laws. The court, however, did not distinctly pass upon the question as to how far the act was effected by that part of this clause in the constitution which declared, "that no retrospective laws shall be passed." It however declared, that it did not omit to pass upon it from any delicacy or serious doubt entertained in that particular instance, but from the paramount importance of the question arising upon statutes infringing upon the constitution more clearly than did the act then under consideration. It remarked, in substance, that the act of 1827 proposed to legislate out of court actions of ejectment, lawfully brought before its passage, by letting in parol proof of an outstanding trust created by contract long before the act was passed; which contract, for any thing appearing to the contrary on this record, was lawful when made, and for the first time declared otherwise by this act; the letting in, and in the grade of evidence, unheard of proof in the pending action of ejectment, and declaring the effect of that proof was, to its mind, very dangerous legislation,

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(*a*) 2 Yerger's R. 555.

and it felt it a duty not to pass entirely unnoticed this point, for fear inferences might be drawn that it thought the act consistent with the clause of the constitution prohibiting retrospective laws and laws impairing the obligation of contracts. Its impression was directly the other way. In the case of *Fisher's Negroes* v. *Dobbs*,(*a*) it was held, that the statute of Tennessee of 1829, which authorized a bill to be filed by slaves, by their next friend, to emancipate them, although it applied to cases that arose before its passage, was not a retrospective law within the meaning of this clause of the constitution.

§ 375. In Vermont, although there is no constitutional prohibition in the state constitution, it has been held that the enactment of retrospective laws was not within the constitutional power of the legislature. In *Ward* v. *Barnard*,(*b*) an act of the legislature releasing a debtor, imprisoned on execution at the suit of a party, from his imprisonment, and freeing his body from arrest for a given time, was held null and void. One ground of this decision was, that the section of the constitution which declared the powers of the legislature, and which gave to it all the powers necessary for the legislature of a free and sovereign state, did not confer this power, as no legislature, as such, had any other than the power of making laws: by the section in the constitution granting powers to it, no other than a law making power was conferred. That the act in question was not a law, for a law was a prescribed rule of civil conduct. Such was a correct and the universally approved definition of municipal law. So far as an act of the legislature was retrospective, or *ex post facto*, it was not a prescribed rule

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(*a*) 6 Yerger's R. 19. (*b*) 1 Aiken's R. 121.

of conduct. This act was retrospective, as it related to past events, and retroactively affected a vested right of the creditor, who had elected to take satisfaction of his debtor in that particular manner. The same principle was adopted in subsequent cases in the same court.(*a*)

§ 376. In *Lyman* v. *Mower*, the court said, that the decision in the case of *Ward* v. *Barnard*, did not proceed upon the ground that the bond was a contract, within the provision of the constitution of the United States prohibiting the state legislatures from passing acts impairing the obligation of contracts, but upon the ground, that the act was an enactment in a particular case, affecting private rights, was retrospective in its operation, and on general principles of law void. That the decision was in conformity with opinions expressed by several successive councils of censors, composed of men of the first respectability for intelligence, having great experience in legislation, and a thorough knowledge of the principles of the government. The question had been several times argued, was maturely considered, and the court were unanimous in the opinion that was pronounced. Subsequent reflection had not shaken their confidence in the soundness and correctness of the decision, nor did they think it at all impugned by the determination in the case of *Mason* v. *Haile*,(*b*) as that case was distinguishable in several very essential and important particulars, and might well be considered as resting on different principles.

§ 377. Although the court in the case last cited, seem to think that its decision did not conflict with the doctrine laid down in the case cited by it from 12 Wheat. Rep. 370, and that the case it decided was distinguisha-

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(*a*) *Lyman's Admr.* v. *Mower et al.*, 2 Vt. R. 517. *Kendall* v. *Dodge & Waterman*, 3 id. 360.

(*b*) 12 Wheat. R. 370.

ble from the case of *Mason* v. *Haile*, we must confess that we have been unable to discover any such distinction as would warrant the inference, that the two cases could be reconciled, or be regarded as harmonizing with each other, so far as the fact of retrospect or retroaction is concerned. The latter case, it is true, was that of a general law applicable to all the citizens of the state, extended by a special law to a particular individual. The former was a special law enacted for a given case, and was confined in its operation to a single individual: in this respect they were different. That is, upon the question whether laws should be special or general, the two cases present cases somewhat different in their character; and perhaps in this respect, the two cases rest upon somewhat different principles, but not so far as the question of retrospect is concerned. The case of *Mason* v. *Haile* decided, that a discharge under a general insolvent act of a state did discharge a prisoner committed to prison for debt antecedent to the passage of the resolve, which extended to the defendant the benefits of an old statute providing for a discharge from debts, and imprisonment for debt. The ground upon which the decision was placed, was that imprisonment for debt was merely remedial, and did not partake of the nature of a vested right. It was no part of the contract, and hence did not come within the rule that statutes should not have a retroactive operation so as to affect vested rights. That if it might be regarded as a punishment for not performing the contract, or might be allowed as a means for inducing the party to perform it, the state might refuse to inflict the punishment, or might withhold it altogether, and leave the contract still in force. We apprehend that the difficulty in sustaining the decision in the case of *Ward* v. *Barnard* is, that in that case, although the court grasped a principle which is a sound one, that the legislature cannot constitution-

ally pass laws which are retrospective and having a retroactive effect upon vested rights, it confounded the marked distinction which exists between matters which are purely remedial, and which are not deemed vested rights, and which may be retroactively affected by subsequent legislation, and matters which do not relate to the remedy merely, but enter into the substantive parts of a contract, expressed or implied, constituting an absolute right, completely and unqualifiedly vested in the party. This, as we have already had occasion to show, is the line which bounds legislative power, so far as retrospective acts are concerned.

§ 378. It has by some been supposed that the supreme court of the United States have decided that state legislatures might pass retrospective laws having a retroactive effect, divesting vested rights. In the case of *Satterlee* v. *Matthewson*,(*a*) Mr. Justice Washington did declare that there was no part of the constitution of the United States which applied to a state law of this description; and that he was not aware of any decision of any of the United States courts, which had condemned a law on this ground, provided its effect be not to impair the obligation of a contract. In *Watson* v. *Mercer*,(*b*) Mr. Justice Story said, "It was clear that this court has no right to pronounce an act of the state legislature void, as contrary to the constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The constitution of the United States does not prohibit the states from passing retrospective laws generally." The same doctrine is reiterated by Chief Justice Taney, in the case of *Charles River Bridge* v. *Warren Bridge et al.*(*c*)

(*a*) 2 Pet. R. 413.
(*b*) 8 id. 110.
(*c*) 11 id. 539.

§ 379. These cases, however, only decide that there is no inhibition against such laws contained in the constitution of the United States; they by no means sanction the doctrine that such kind of laws are within the legitimate scope of legislative authority. In neither of those cases did the act under consideration divest any vested right, and all that the court said upon the subject of retrospective laws divesting vested rights, was *obiter dicta*. In the case cited from 2 Peter's R., the act simply changed a rule of evidence as between landlord and tenant, so that a tenant might in an action dispute the title of his landlord, which under the common law he could not do; and even that act was confined to cases which had not passed into judgment, so as to become a vested right under a judgment.(*a*) The case of *Watson* v. *Mercer*, was an act which cured a defective acknowledgment of a deed, and the decision was placed on the ground that the act did not affect or touch any title acquired under any patent or deed. It assumed the title good, and made the deed effectual to secure the right which vested, or was intended to be vested under the deed: in other words, gave effect to vested rights. The case of *The Charles River Bridge* v. *The Warren Bridge* above cited, does not necessarily determine that the legislature may legitimately pass retrospective laws having a retroactive effect, and thereby divest vested rights. It is true, as we have seen, it was held that state laws might be retrospective in their character, and might divest vested rights without conflicting with the constitution of the United States, unless it impaired the obligation of a contract. This proposition, restricted as it is in that decision, is undoubtedly true; for that in-

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(*a*) See also, 13 Sergt. & Rawle, 133; 16 ibid. 169. *Delancy* v. *Tilghman*, 6 Gill. & Johns. 461. *Wilkeson* v. *Leland*, 2 Pet. R. 627.

strument does not contain any inhibition against state legislatures passing retrospective laws, having a retroactive effect upon mere civil rights. By a critical examination of this case, it will be perceived that it was unnecessary for the court to lay down that proposition qualified as it was; and so far as relates to retrospective laws divesting vested rights, it is also *obiter dicta;* for that question did not arise out of the facts in that case. The facts in that case were, that a charter had been granted to a bridge company with authority to receive tolls for a certain number of years. Before the expiration of that charter, the legislature incorporated another company with authority to erect a bridge over the same river, in such proximity to the bridge of the former company as seriously to affect its tolls. The validity of the last act came in question in this cause. The court held, that the charter of the first company did not create a contract with it, that no other bridge company should be incorporated. It will be perceived, if this was so, they had no vested right to all the tolls paid by persons crossing this river. The only right in this respect which vested in it, was a vested right in all such tolls as should accrue from persons who actually crossed its bridge. The latter act, therefore, did not in this respect affect any right vested in the first company under its charter. Hence, it was not necessary for the court to decide, that a retrospective law might be passed having a retroactive effect, so as to divest vested rights. The decision was put upon the ground in fact, that the act did not divest any vested right which had been secured to the company by its charter, or which had become vested in it. This case, as well as the two other cases above cited, on the one hand, distinctly recognize the sanctity of rights vested under any compact; and on the other, they do not sanction the doctrine, nor do they sustain the posi-

tion that a state legislature, in the legitimate exercise of its authority, may by retrospective legislation, divest vested rights. They only declare that they may do so for aught that is contained in the federal constitution.

§ 380. The doctrine of these cases does not conflict with the views we have taken in a preceding chapter, when considering laws of this character. We omitted then to refer to them as they came more properly under consideration as a constitutional question. It has been held, that statutes, the object of which are to cure all defective acknowledgments, in a certain class of deeds, and give them the same efficacy as if they had been originally in proper form, are valid acts of legislation.(*a*) But such statutes do not apply to cases which have actually passed into judgment, under which rights have become absolutely vested.(*b*) Other confirmatory acts have been sustained in other states, although not decided strictly under any express constitutional inhibition against retrospective laws. The judges of the court in Connecticut have repeatedly, in sustaining such acts, said that retrospective laws, impairing vested rights, if not clearly unjust were entitled to obedience, and to disregard an act of the legislature, unless it be inequitable, oppressive, and in violation of the social compact, is not within the confines of judicial authority.(*c*) In two of the cases cited, the acts were acts confirming certain acts defectively executed, or declaring that certain acts should not be deemed void which otherwise would have been so. And in the first case, the act under consideration made

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(*a*) *Tate* v. *Stooltzfoos*, 16 S. & R. 35. *McMaster* v. *The Commonwealth*, 3 Watts' R. 294. *Walter* v. *Bacon*, 8 Mass. R. 472.

(*b*) *Barnett* v. *Barnett*, 15 S. & R. 72.

(*c*) *Goshen* v. *Stonington*, 4 Conn. R. 209. *Mather* v. *Chapman et al.*, 6 Conn. R. 54. *Beach* v. *Walker*, 6 Conn. R. 197. *Booth* v. *Booth*, 7 Conn. R. 365. *Norton* v. *Pettibone*, 7 Conn. R. 319.

valid an informal marriage. In that case, as we have already seen, Hosmer, Ch. J., dissented. The decisions in Connecticut are based on the reason, that every act of the legislature implies an opinion, that the legislative body had a right to enact it, and that the judiciary would discover sufficient promptitude, if it determine a law to be invalid, that operates by retrospection unjustly on persons or property. That this principle steers a correct medium, admitting the sovereignty of the legislature to do justice, by an act unquestioned by the court of law, while it equally repels the supposed uncontrollable omnipotence of the same body, to require the observance of an unjust law, in subversion of fundamental rights, and in opposition to the social compact. They concede that this question is not free from difficulty. But hold, that unless the doctrine sanctioned by this rule be embraced, this extreme would be resorted to, that every retrospective law, however just or wise, affecting the property of an individual, must be considered as of no validity, and thus, in cases the most equitable and salutary, the judiciary must deny the legislature the right to pass a law, oppressive to no one, and promotive of entire justice. In the case in which these views were expressed by Hosmer, Ch. J., Mr. Justice Lanman concurred, Mr. Justice Peters dissented, and Justices Brainard and Dagget expressed no opinion. The act in question in this case was a confirmatory one, providing that no levy of an execution on real estate previously made should be deemed void, because the officer embraced in his return as part of the cost of the levy, other and greater fees than were by law allowed. These acts, it is true, some of them operated upon and affected, to some extent retrospectively, vested rights, yet none of them, so far as operative as confirmatory, merely, divested any vested right, in the proper sense of the term. They legalized past acts defectively done. They were

confirmatory of acts of a remedial nature, and legalized things pertaining to remedial proceedings, connected with the enforcement of rights, to some extent authorized and sanctioned by law. Were declarative that an act by which vested rights had been divested, should not be rendered nugatory, because, by accident, mistake, or otherwise, there had been an excess or defect of authority, in a matter connected with an act, *per se*, legal to some extent, unless tainted by an illegal act or defect growing out of extraneous matters. That such defect or excess should not vitiate the whole of the proceedings, those that were otherwise authorized as well as those not. They merely sanction the doctrine that a past error shall not be unalterably and irretrievably fixed, beyond the power of legislation, in cases where it may be remedied without injustice, or inequitable oppression, and without any violation of the fundamental principles of the social compact. An act producing neither of these effects, and at the same time promotive of justice and equity, and restricted within the limits which in these cases has been prescribed, can hardly be regarded as an act taking from one a vested right, and vesting that right in another, or in other words, to operate, *per se*, by retrospection, so as to divest antecedently acquired interests. In the case last cited, the law which was altered by the act, authorized the divesting of an estate for the payment of a debt, and to that extent authority to divest existed by the former law and under which the proceedings were had, though not strictly conformable to its literal import. The confirmatory act declared in effect, that an estate divested under an authority of law *pro tanto* legal, should not be defeated or vitiated on account of an excess in the exercise of an authority expressly given to a certain extent. Such acts of legislation may perhaps be defended on the ground that they fall more properly under the denomination of purely remedial acts, which, as we have seen, have uni-

formly been sanctioned by the civil and common law, although retrospective in their character.

§ 381. The learned and now lamented Chancellor Kent, who has shed so much light upon American jurisprudence, says: "A retrospective statute affecting and changing vested rights, is very generally conceded, in this country, as founded on unconstitutional principles, and consequently inoperative and void." He cites in support of this doctrine numerous authorities, some of which have already been considered by us,(*a*) and then adds: "But this doctrine is not understood to apply to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy by curing defects, and adding to the means of enforcing existing obligations.(*b*) Such statutes have been held valid, when clearly just and reasonable, and conducive to the general welfare, even though they might operate in a degree upon existing rights, as a statute to confirm former marriages defectively celebrated, or a sale of lands defectively made or acknowledged. The legal rights affected in those cases by the statute, were deemed to have been

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(*a*) See Tennessee Bill of Rights, art. 20. New Hampshire Bill of Rights, art. 23. *Osborne* v. *Huger*, 1 Bay, 179. *Ogden* v. *Blackledge*, 2 Cranch, 272. *Bedford* v. *Shilling*, 4 Sergt. & Rawle, 401. Duncan, J., in *Eakin* v. *Raub*, 12 ibid. 363-372. *Society for Propagation of the Gospel* v. *Wheeler*, 2 Gallison R. 105. Washington, J., in *Society for Propagation of the Gospel* v. *New Haven*, 8 Wheat. R. 493. *Merrill* v. *Sherbrune*, 1 N. H. R. 199. *Ward* v. *Barnard*, 1 Aik. R. 121. *Brunswick* v. *Litchfield*, 2 Greenl. R. 28. *Proprietors Kennebeck Purchase* v. *Laboree*, 2 ibid. 275. Story, J., in *Wilkeson* v. *Leland*, 2 Pet. R. 657, 658. *Lewis* v. *Brackenbridge*, 1 Blackf. Ind. R. 220.

(*b*) Duncan, J., in *Underwood* v. *Lilly*, 10 Sergt. & Rawle, 101. *Tate* v. *Stooltzfoos*, 16 ibid. 35. *Bleakney* v. *F. & M. Bank*, 17 ibid. 64. *Foster* v. *Essex Bank*, 16 Mass. R. 245. *Lock* v. *Dane*, 9 id. 360. *Townsend* v. *Townsend*, 1 Peck. Tenn. R. 16; 17 ibid. 266.

vested subject to the equity existing against them, and which the statute recognized and enforced. But the cases cannot be extended beyond the circumstances on which they repose, without putting in jeopardy the energy and safety of the general principle."(*a*)

§ 382. It is true, however, that all such acts lie close upon the line which divides legitimate from illegitimate acts of legislation. To draw that line with nice precision, and run it with technical accuracy, is a matter of much intrinsic difficulty, and requires great discriminative powers and intellectual discernment. It has, indeed, taxed the intellect of many of the ablest minds which have adorned and illuminated by their genius and legal acumen, the jurisprudence of a nation illustrious in all that pertains to the science of legislation, under a written and well defined fundamental law, as the basis of the civil compact of an independent and free people. It ever has been, and probably ever will be, a difficult and vexed question, presenting itself in many varied aspects; and as hitherto, it probably ever will be the subject of much conflict and contrariety of opinion among the ablest, the purest, as well as the most discriminating minds which shall hereafter sit in places of judgment, clothed with the judicial power of the confederated American States, or with that of each distinct and separate member of our augmented and constantly augmenting confederacy.

§ 383. The next restriction upon legislative power which we shall consider, is that affecting the right of trial by jury. The seventh amendment of the constitution of the United States declares, that "In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be pre-

(*a*) 1 Kent's Com. 455.

served." We have already seen that this restriction does not apply to the state governments, but restricts only the government of the United States, and the proceeding of the federal courts.(*a*) The same rule also obtains in reference to the sixth amendment of the federal constitution, which in criminal cases secures to the accused a trial by jury.(*b*)

§ 384. The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into, and secured in every state constitution in the Union. One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the seventh amendment to the constitution proposed by congress; and which received an assent of the people so general as to establish its importance as a fundamental guaranty of the rights and liberties of the people. At this time there were no states in the Union, the basis of whose jurisprudence was not essentially that of the common law in its widest meaning, and probably no states were contemplated in which it would not exist.

§ 385. A question has frequently arisen as to the meaning of the phrase "*common law*," used in this clause. In *Parsons* v. *Bedford*,(*c*) it was held, the phrase "common law," found in this clause, is used in contradistinction to equity, and admiralty, and maritime juris-

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(*a*) *Livingston* v. *Mayor, &c., of New York*, 8 Wend. R. 100. *Colt* v. *Eves*, 12 Conn. R. 243.

(*b*) *Murphy* v. *The People*, 2 Cow. R. 815. *Jackson* v. *Wood*, 2 Cow. R. 819.

(*c*) 3 Peters' R. 433.

prudence. The constitution had declared in the third article, "that the judicial power shall extend to all cases in *law and equity* arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority," &c., and to all cases of admiralty, and maritime jurisdiction. It is well known, that in civil causes, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court. When, therefore, we find that the amendment requires that the right of trial by jury should be preserved in suits at common law, the natural conclusion was, that this distinction was present to the minds of the framers of the amendment. By *common law*, they meant what the constitution denominated, in the third article, "law;" not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were regarded, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law and of maritime law and equity, was often found in the same suit. Probably there were few if any states in the Union, in which some new legal remedies, differing from the old common law forms, were not in use, but in which, however, the trial by jury intervened, and the general regulations in other respects were according to the course of the common law. Proceedings in cases of partition, and of foreign and domestic attachment, might be cited as examples variously adopted and modified. In a just sense, the amendment then might be well construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they might assume to settle legal rights. And congress seems to have acted with reference to this ex-

position in the judiciary act of 1789, ch. 20, (which was contemporaneous with the proposal of this amendment,) for in the ninth section it is provided, that "the trial of issues in fact in the *district courts* in all cases, except civil causes of *admiralty* and *maritime jurisdiction*, shall be by jury." And in the twelfth section it is provided, that "the trial of issues in fact in the *circuit courts*, shall, in all suits, except those of *equity* and of *admiralty* and *maritime jurisdiction*, be by jury;" and again in the thirteenth section it is provided, that "the trial of issues in fact in the *supreme* court *in all actions at law*, against citizens of the United States, shall be by jury." If a suit be instituted in the federal court, in an action at common law, those courts in their proceedings will conform to the mode of proceeding and trial prescribed by the constitution of the United States, though a different mode may be prescribed by the laws of the state in which the cause of action arises.(*a*) In accordance with this principle, if in an action at common law in a federal court, a state law provides for a different mode of trial, such provision will by the federal courts be deemed repugnant to the clause in the federal constitution, now under consideration. Thus in the case of *Bank of Hamilton* v. *Dudley*,(*b*) it was held, that the occupant claimant law of Ohio, which declared that an occupying claimant should not be evicted or turned out of possession until he should be paid for his improvements, and directed the court, in a suit at law, to appoint commissioners to value the same, was repugnant to this clause in the federal constitution. That the compensation for improvements in such suit must, whenever the action was pending in the federal court, be submitted to a jury.

(*a*) *Bank of Hamilton* v. *Dudley*, 2 Peters' R. 492. *Parsons* v. *Bedford*, 3 Peters' R. 433.

(*b*) 2 Peters' R. 492.

§ 386. Under the constitution of Kentucky it has been held, that the clause in the constitution securing the right of trial by jury, does not enlarge the right of trial by jury so as to extend it to cases where, previous to the constitution, that mode of trial did not belong to the party as a matter of right; and in all cases where the legislature had withheld or might withhold the trial by jury before the constitution, they might do so after the constitution went into operation. That government never did, either before or since the constitution, extend or grant the right of trial by jury to every controversy between it, and any of its citizens. That to criminal and penal offences it did belong, but not to public debtors. It is upon this principle that taxes were always recoverable, not only without jury, but even without judge, and the assessment of the ministerial officer was made to operate as an execution on the citizen.(*a*) In Virginia, where by statute passed previous to the adoption of the constitution, the court of chancery had jurisdiction to try a matter without the intervention of a jury, that right was not taken away by the adoption of the constitution.(*b*) The court in the case last cited, say: "The propriety of the court deciding without calling a jury, might have been more doubtful if, at the adoption of our constitution, the matter had been exclusively cognizable at law, and the court of chancery had taken jurisdiction under a statute subsequently enacted. A decision of the facts by the court might then be considered an innovation of the ancient right of trial by jury, and in conflict with that provision of the constitution which declares that the ancient mode

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(*a*) *Harris* v. *Wood*, 6 Munroe's R. 642. See also, *Creighton* v. *Johnson*, 6 Litt. R. 241. *Watts* v. *Griffin*, 6 id. 247.

(*b*) *Watts* v. *Griffin*, 6 Litt. 247.

of trial by jury shall be held sacred, and the right thereof remain inviolate. But the statutes to which we have referred, were all enacted long before the adoption of the constitution, and every power which the court derived from those statutes before the adoption of the constitution, may no doubt now be exercised without violating any constitutional provision. The statute of this country, it is true, was enacted after the adoption of our first constitution; but that statute confers no power on the court which it did not possess under the statutes of Virginia; and according to those statutes we apprehend the court might decide the case without a jury. Those statutes contain no express provision as to the mode of deciding the causes, but they contain a grant of jurisdiction, and that implies a grant of all power necessary to the final decision of the matter in contest."

§ 387. In Kentucky it has been held, "That part of the Kentucky statute of 1792, prohibiting dealing with slaves, without their owner's consent, which provides that the owner may recover four times the value of the article transferred, by the judgment of a justice of the peace, if it be under five pounds, was unconstitutional, as it deprived the party of a trial by jury."(*a*) So, for the same reason, the third section of the statute of 1799, concerning the public arms of the state of Kentucky.(*b*) And so, also, of the statute of 1810, authorizing the county court to impose a fine, without trial by jury, for giving in a false and fraudulent list of taxable property.(*c*) In the case last cited, the question arose under an order and judgment of the county court, imposing a fine and treble tax on a party for giving in to the commissioners of tax, a false and fraudulent list of his

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(*a*) *Enderman* v. *Ashby*, Pr. Dec. 65.
(*b*) *Stidger* v. *Rogers*, Pr. Dec. 64.
(*c*) *Carson* v. *Commonwealth*, 1 A. K. Marsh. R. 290.

taxable property. Upon the return of the summons into the county court, the party fined and taxed appeared and moved the court for a jury to be empannelled for the purpose of trying the issue. The motion was overruled, and judgment rendered in favor of the commonwealth. This order and judgment came up for review, and the only question made was, whether the court decided correctly in refusing to cause the issue to be tried by a jury. The court in that case say: "Testing the case exclusively by the act of January, 1810,(*a*) we should be induced to accord with the decision of the county court; for, as by that act the court is directed upon the appearance of the defendant, and defence made, to proceed to inquire into and decide the contest, the instruction there given the court, strongly negatives the necessity of calling a jury to assist in its determination. But, as by the constitution of this country, the right of trial by jury is held sacred, and made inviolable, we should, in deciding upon questions involving such a right, look to that instrument as the paramount rule, and give such an operation to the acts of the legislature, as shall accord with its clear and obvious import. In deciding upon the present contest, then, it becomes only necessary to inquire whether or not, the case now before us is of that description which, by the constitutional right, trial by jury is guarantied to the defendant. Still, in making the inquiry, it is material barely to look into the laws regulating the trial of such cases at the time and previous to the adopting the constitution. For, if before and at that time, those who should be accused of like offences, were by the existing laws, allowed to have a decision of their cause by a jury, any change in the law, by which they may be deprived of that privilege

(*a*) 4 Little's R. 161.

must, as it is an innovation upon the ancient right, be considered an infraction of the clear and obvious meaning of the constitution. Looking to those laws, then, we can have no hesitation in deciding that the defendant in the court below was entitled to a trial of the issue by jury. By an act of the Virginia legislature of 1786, a fine and treble tax is imposed upon such as may give in a false and fraudulent list of taxable property, and in pointing out the mode of ascertaining the truth of such a charge, the act expressly gives to the person accused the privilege of either having a jury called, or a decision by the court. That act, it is believed, was not repealed, but continued in full force until the adoption of the constitution, and after being adopted by that instrument, was re-enacted by the legislature of this country at their first session in 1792,(*a*) and continued in force until the act before alluded to in 1810. Under this state of the law, therefore, at the adoption of the constitution, although the act of 1810 seems to bear a different import, we are of opinion, that in accordance to the controlling influence of the constitution, the supreme and paramount law of the country, the court below ought, at the instance of Carson, to have tried the issue by a jury."

§ 388. It has also been held, that the ninth section of the act of 1800 of Kentucky, which provided, that "on the dissolution of an injunction, judgment shall be given by the court against the sureties, as well as the plaintiff in the injunction bond. And in all bonds hereafter given on appeals and writs of error, when the judgment of the superior court shall be affirmed in part or in whole, the judgment shall be given against the securities in said appeal or supersedeas bond, as well as against the principal, and execution shall issue accordingly," was uncon-

(*a*) 1 Little's R. 63.

stitutional.(*a*) The court held, in the case last cited, that "Upwards of twenty years since, and immediately after the passage of this act, this court decided it to be unconstitutional, and refused to enforce it, and the act had remained in their code as a dead letter ever since; and among all the courts, superior and inferior, notwithstanding the imperative language of the act, not one, till the present case, had ever undertaken to render a judgment or decree enforcing it. After such a total disregard of its provisions, and after such a long acquiescence by the judicial sense of the state, they were bound, whatever their private opinions might be, were it *res nova*, not to enforce it; especially as its operations would prove a surprise upon many litigants and more sureties, who had not believed themselves in such danger when they executed such bonds. It was not easy to foresee what would be the effect of such enforcement against all the sureties then bound in injunction, supersedeas and appeal bonds. The operation of one new rule was often more extensive than the abolition of many old ones.

§ 389. A statute authorizing a judgment to be entered on motion for breach of an agreement, thereafter to be made, to pay money for the building of a penitentiary, has been held not within this constitutional provision.(*b*) And the same rule has been adopted where a statute gave a right to sureties to recover, by summary process, money paid for their principal. The decision in this latter instance was placed on the ground, that a court of equity, prior to the adoption of the constitution, had jurisdiction in such case, and to proceed without the intervention of a jury.(*c*) So too, it has been held, that in

(*a*) *Hughs* v. *Hughs*, 4 Monroe's R. 43.
(*b*) *Ewing* v. *Directors*, &c., Hardin's R. 5.
(*c*) *Watts* v. *Griffin*, 6 Litt. R. 247.

debt or covenant, where the amount has been liquidated by the act or deed of the parties, the court may proceed without the intervention of a jury to assess damages. This case also has been put upon the same ground as that last cited.(*a*)

§ 390. Statutes giving summary remedies against public officers and their sureties have, in Kentucky, been held not to be within this clause of the constitution.(*b*) In Indiana such a statute was sustained; the court, however, placed their decision on the ground, that there were no express words in the act depriving the parties of their constitutional right of trial by jury, and that the court were unwilling to believe the legislature ever intended to abridge this palladium of liberty so particularly noticed in the declaration of independence, and secured by the constitution of the state. It however held, that if such was its intention, that so much of the statute as destroyed the common law right of trial by jury in civil cases, where the value in controversy exceeds twenty dollars, was unconstitutional.(*c*)

§ 391. Where before the adoption of the former constitution of Pennsylvania in 1790, justices of the peace, by an act passed the 5th April, 1785, had jurisdiction in cases of debt or demand, not exceeding £10, but by a law passed 19th April, 1794, that jurisdiction was increased in cases of the same kind to an amount not exceeding £20. "This law directed, that if any person should bring suit in other manner than was provided by the act, and should not recover more than £20 he should not have judgment for any costs; at the same time it provided, that either plaintiff or defendant in a suit brought before a justice for a demand above £10 might,

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(*a*) *Harrison* v. *Chiles*, 3 Litt. R. 200.

(*b*) *Murray* v. *Askew*, 6 J. J. Marsh. 27. *Wells* v. *Caldwell*, 1 A. K. Marsh. 141.

(*c*) *Dawson* v. *Shaver*, 1 Blackf. R. 204.

before judgment, elect to have the cause tried in the common pleas, the defendant, if he was the party electing, giving security in the nature of special bail, or to enter a common appearance, accordingly as the cause originated by *capias* or summons; and it entitled either party, even after judgment, if the amount exceeded £5, to appeal to the common pleas, upon giving security to answer costs, to prosecute the appeal with effect, &c. The same jurisdiction, thus modified, was given to the alderman's court, which proceeded without the intervention of a jury." The constitutionality of this act came in question in *Emerick* v. *Harris*,(*a*) on the one hand, it was contended: "That the law of 19th April, 1794, was not contrary to the constitution. That the legislature had an express right by that instrment, to organize new judicial tribunals; and that so long as the trial by jury was preserved through an appeal, the preliminary modes of obtaining it might be varied at their will and pleasure. That to deny them this right, was to prohibit the minutest change in any of the formal process and rules by which jury trial was obtained and regulated. That by this law the trial was open to the parties at their own election, or by appeal; and it rested with them, whether to remain before the magistrate, or to proceed in the old way. That the only difficulty was about the costs; and that therefore the question of constitutionality came to this, whether the legislature had a right to abridge, or to abolish costs, in cases wherein they were recoverable before the constitution was adopted. That this was almost too plain for argument, and was a matter upon which a multitude of laws had been made since that time, without a suggestion of their impropriety. That it was always a question of policy for the government,

(*a*) 1 Binney's R. 416.

and not of right in the party; some parties paying none, others paying double or treble costs according to the nature of the case; a proportion sometimes existing between them and the damages recovered, sometimes not; the whole being an arbitrary system, of the change of which, or even its extinction, no one had a right to complain." On the other hand it was contended, "That the constitution, by directing that trial by jury should be as heretofore, and the right thereof remain inviolate, had interdicted the legislature from abolishing or abridging this right in any case, in which it had existed before the constitution. That a prohibition to do this directly, was a prohibition to do it indirectly, either by deferring the decision of a jury until one, two, or more previous stages of the cause had been passed, or by clogging the resort to that tribunal by penalties of any kind, either forfeiture of costs, security upon appeal, or delay. That the power to obstruct at all, implied a power to increase the obstructions, until the object became unattainable; and that the instant the enjoyment of the right was to be purchased by sacrifices unknown before the constitution, the right was violated, and ceased to exist as before. That the question was not whether the legislature had a right to take away costs altogether, but whether they could make the loss of them a penalty for demanding a right secured by the constitution. That all encroachments upon constitutional rights were in the first instance minute; that they increased in magnitude, as the boldness of the usurping power increased by the acquiescence of the citizen; and that therefore it was the duty of the judiciary to detect and resist the usurpation at the outset." Yeates, J., remarked: "When the convention declare in the fifth section of the bill of rights, that 'trials by jury shall be *as heretofore*, and the right thereof shall remain inviolate,' I do not conceive that

any restriction is thereby laid on the legislative authority, as to erecting or organizing new judicial tribunals in such manner as may be most conducive to the general weal, on a change of circumstances effected by a variety of causes. This appears plain to me from the fifth article of the constitution, which vests the judicial power of the state 'in a supreme court, courts of oyer and terminer, and sessions of general jail delivery, common pleas, orphan's court, register's court, sessions of the peace, justices of the peace, and in *such other courts* as the legislature may from time to time establish.' But it is equally obvious to my understanding, that the legislature cannot constitutionally impose any provisions substantially restrictive of the right of trial by jury. They may give existence to new *forums;* they may modify the powers and jurisdiction of former courts, in such instances as are not interdicted by the constitution from which their legitimate powers are derived. Still, the sacred inherent right of every citizen, a trial by jury, must be preserved. '*It shall remain inviolate*, as heretofore.' When the present state constitution was formed, the £10 act which passed on the 5th April, 1785, was in full force, and must be presumed to have been in the contemplation of the convention, who by the words 'as heretofore,' virtually confirmed it. The law now in question was enacted at a subsequent period on the 19th April, 1794; and is therefore subject to legal discussion. It extended the jurisdiction of justices of the peace to £20. With the wisdom, sound policy, or expedience of that law, this court have nothing to do. These are matters purely of legislative deliberation and cognizance. I cannot avoid lamenting that the original jurisdiction of suits embraced by the act is exclusively assigned to a single justice, and only an appellate jurisdiction reserved to a jury. But it must be admitted that the right of trial by jury is not taken away, though the

party may be subjected to some inconvenience in making his election. The law therefore appears to me not to be that *plain and clear case*, in which I should feel myself authorized to pronounce on its invalidity, as a deviation from the constitution."

§ 392. Mr. Justice Brackenridge, in the same case, said: "It is of less moment that under this act the jurisdiction of the justices is extended to a demand of £20; yet it may be said to be 'contrary to the spirit of the constitution.' For though an appeal is saved in debt or demand above £5, yet there is in the first instance a privation of the trial by jury. It is true there is weight in the consideration expressed in the preamble of the act, 'the lessening in the value of money.' But it cannot be in the spirit of the constitution, but contrary to it, to extend the jurisdiction of the justices of the peace, *ad libitum*, and to any extent, even allowing the appeal. Yet it is one thing to be contrary to the spirit of the constitution, and another thing to be in direct violation of it. 'Trial by jury shall be as heretofore.' But trial by jury *heretofore*, had not been known in the forum of the justice. And it could not be with a view to secure the jury trial in this forum, that the provision was introduced. It must have been to secure the trial in the courts where it had existed; or to secure it in those courts which 'the legislature may from time to time establish.' But in the distribution of judicial power to the justices of the peace where the trial by jury does not exist, what is given more to the cognizance of the justice, is making less the jurisdiction of the courts where the jury trial does exist; and is indirectly taking away the trial by jury from the subject of the jurisdiction given to the justice. Yet this is but an indirect invasion; and the difficulty is to say where it may begin to be an invasion, unless it is assumed as a principle that it cannot be extended beyond what it was at the

time of framing the constitution; and this, taking into view the history and progress of the jurisdiction, would seem to be assuming more than is justifiable. If then we are not arrested at the precise point where the matter stood at the framing of the constitution, with respect to an enlargement of the jurisdiction of the justice of the peace, how far shall we go? Where shall we stop? Is it competent to the judiciary to fix this point? Is it not in the nature of it, a matter of discretion, a question of expediency? And must it not be left to the legislature? What might be done in an extreme case which might be imagined, an accumulation of jurisdiction in a justice of the peace far beyond any thing like what had before existed, it is not necessary to say; for the present would not appear to me to be such a case, nor can it warrant the judiciary to exercise an act of such paramount and delicate authority as to interfere. My opinion therefore must be for the plaintiff in the suit before the justice. It will be observed that I have confined myself to the act giving jurisdiction to the justice of the peace in demands not exceeding £20, under which the jurisdiction in the case before us arises; and which act, being of the 19th April, 1794, is an extension of the act of March, 1745, and subject to, and under every regulation, restriction and exception in that act. The exceptions in that act with respect to the subject of controversy, debt for rent, debt upon bonds for performance of covenant, actions of covenant, replevin, &c., have been stated, and the jurisdiction in the act in question being subject to the like exceptions, it has not come in my way, in considering the case before us, to take notice of what might be the question in a case where the subject of jurisdiction was enlarged as to the cause of action, as well as to the quantum of the demand; or as to the cause of action itself. I take it to be of more moment that the jurisdiction be confined as to the subject of controversy, than as

to the quantum of demand, or at least as much; for the principle of law, which may come in view and be disposed of by the justice, may be of as much consequence as the value of the property. I should feel myself under more difficulty to reconcile the enlarging the jurisdiction as to cause of action, than as to quantum of demand. But there is nothing in the act before us which goes beyond debt, or contract, or actions not excepted in the act of March, 1745."

§ 393. In another case in the same state, it was held, that where the defendant had a right, in a case tried before a justice, to appeal to the court of common pleas, where he might have a trial by jury, although required to make oath "that he verily believed injustice had been done him, and that the appeal was not made for the purpose of delay," was not one in conflict with this clause in the constitution. That this provision was no more than a wholesome regulation. The object of courts was to administer justice, and no man had a right to complain, because he was refused an appeal intended for the purpose of delay; or in a case in which he did not think that he had suffered injustice, that such laws as this promoted justice, and left the substance of the trial by jury unimpaired; and that was all that was required in the expression in the constitution, that "trial by jury shall be as heretofore."

§ 394. In Connecticut, where the provisions of a city charter provided that the jury should be taken from the freemen of the city, instead of the body of the county, it was held that the act was not repugnant to the constitution of that state, which declares that the right of trial by jury shall remain inviolate.(*a*) It was objected that the jury were not taken from the body of the county, but from a particular section, and thus the right of trial by jury was

(*a*) *Colt* v. *Eves*, 12 Conn. R. 243.

not preserved inviolate. But the court held, that to preserve the right of trial by jury inviolate could not mean, that we must pursue the exact course taken in England. If it did, it would be difficult to say what time should be selected as the criterion, for in England the qualification of jurors had been constantly changing. That beside this, the common law required merely that the jury should come from the vicinage. That the direct principles of the common law had in fact been adopted in the city charter. But even if it were an innovation upon the common law, it would not follow that the trial by jury was not preserved inviolate. It never could have been intended to tie up the hands of the legislature, so that no regulations of the trial by jury could be made. The same court in a previous case held, that within the reasonable intendment of this clause in the constitution, if the trial by jury be not impaired, although it might be subject to new modes, and even rendered more expensive, if the public interest demanded such an alteration, it would not be a violation of this clause in the constitution.(*a*)

§ 395. In New York, it has been determined that a statute creating a court of special sessions for the trial of petit larceny, without a jury, was not in conflict with a former constitution of that state, which declared "The trial by jury in all cases in which it has been heretofore used, shall remain inviolate forever." In one case where the constitutionality of the act came in question,(*b*) the decision was placed upon the ground, that the constitution of 1821 made that case a special exception, so that no question of its constitutionality could arise under it; and that the constitution of 1777 had, in express terms, retained such parts of the common law of England, and

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(*a*) *Beers* v. *Beers*, 4 Conn. R. 535-539.

(*b*) *The People* v. *Murphy*, 2 Cowen's R. 815.

of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York as did together form the law of the colony on 19th of April, 1775. That as early as 1774, and previous to the adoption of the constitution of 1777, an act authorizing a trial of such an offence by three justices, had been passed, and hence the statute did not conflict with the constitution. In the case of *Jackson, ex dem. Wood* v. *Wood*,(*a*) Chancellor Walworth in 1824, then circuit judge, who passed upon this question, said: "The former constitution of this state was in force at the time of this conviction, and the only part which had any bearing upon the question, was the 41st article. That part of the constitution provided, that trial by jury, in all cases in which it had before been used in the colony of New York, should remain inviolate forever, and that the legislature should, at no time thereafter, institute any new courts but such as should proceed according to the course of the common law. If the act of 1801, authorizing a trial by special sessions, without indictment or jury, in cases of petit larceny and other small offences, had been the first law instituting such courts and authorizing such trials, it would have been a palpable violation of this article of the constitution. But this act was only a revision of a former law, which was in force at the adoption of the constitution, in 1777, and as it respected these courts and the offences of which they had cognizance, contained no new provisions. The first act instituting such courts, and containing substantially the same provisions, was passed by the colonial legislature in 1744. It was amended in 1768, and was re-enacted in the revisions of the laws in 1788, 1801 and 1813; and it is recognized and provided for by the 7th article of the new constitution of this state. No right of trial by jury

(*a*) 2 Cowen's R. 819.

ever existed in those courts until it was authorized by the act of the last session. The legislature, therefore, did not establish any new court, and the right of trial by jury remained as it had been used in the colony of New York, previous to the adoption of the constitution."

§ 395. The constitution of Massachusetts provides, "In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherwise used and practised, the parties have a right to trial by jury." It has been held, that this provision was not violated by a law which disallowed an appeal from a justice of the peace, on a complaint filed to collect a fine under the militia law.(*a*) In the case cited, however, it was not necessary for the court to pass upon this question. Mr. Justice Thatcher, in the opinion delivered by him, declared that on this constitutional question he did not think it necessary to give an opinion. The constitution had not secured the right of appeal in any case: that was left wholly to the legislature; nor had the constitution undertaken to detail, or even to specify the mode in which parties were to have the trial by jury: that was left to the legislature. Sewell, J., held, that whatever might be the construction or effect of this article of the constitution in ordinary cases, it had no application to the case then under consideration. That the appeal was claimed against a judgment, or decision, by the justice or justices upon the trial of an issue of law, exclusively cognizable by the justice or justices, without the intervention of a jury; and at the time of the appeal claimed, no issue had been taken or tendered by the defendant, suitable for the cognizance of a jury. At the utmost, this clause could only preserve the right, to be exercised at the will

(*a*) *Mountfort* v. *Hall*, 1 Mass. R. 443.

of the party. Mr. Justice Sedgwick placed his decision on the ground that it did not appear, nor had any laws been shown for that purpose, that before the framing of the constitution a man charged with a mere neglect of militia duty, was entitled to a trial by jury, but the fact it was believed, was directly to the contrary. Hence, the defendant was not deprived of a trial by jury in a case where before the constitution, it had been otherwise used and practised.

§ 396. It has also been held in the same state that trials of questions of settlement of paupers might be required to be had by the court without the intervention of a jury without any conflict with this clause.(*a*) The decision in this instance, was also placed on the ground that it came within the exception to that general provision of causes which were used and practised otherwise before the adoption of the constitution. That from the first settlement of the country, all questions relative to the settlement or removal of paupers had been heard and determined by the courts of the general sessions of the peace, without the intervention of a jury.

§ 397. We have now discussed all the questions on the subject of legislative power which the limits of this work will admit of, and must bring this branch of our subject to a close. There is one other question which, although not arising under this head, demands a moment's consideration, as it stands connected with the subject of legislative power. That is the question as to the manner, and by whom, an abuse of legislative authority is to be controlled. We shall, therefore, close this part of our commentaries, by adverting in this place to the question of the power of courts to declare a statute

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(*a*) *The Inhabitants of Shirley* v. *Lunenburgh*, 11 Mass. R. 379.

void, on the ground of it being repugnant to, or in conflict with, the constitution.

§ 398. In a preceding chapter we considered the controlling force of statutes, and the power of courts to declare them void, independent of any question as to conflict with the provisions of any written constitution. We therein considered the extent of authority claimed for the parliament of England, and the views which had been taken of this question by legal writers; wherein it was seen, that it had been claimed, that parliament could do any thing that was not naturally impossible, and that some writers had not scrupled to call its power by the bold figure of the omnipotence of parliament, and that which it did, no power or authority on earth could undo. We live under a government unlike that of England, from whence we have derived many of our laws, and whose system of jurisprudence has been extensively copied by most of the American states; yet, the jurisprudence of England sheds no light on the great and important question which is the subject of our present inquiry. It is difficult to define what the constitution of England is; for, it is not reduced to writing, nor characterized by the certainty and precision of a written and permanent fundamental law; it bends to every govermental exigency; it varies and is blown about by every political breeze, or legislative humor and caprice.(*a*) It is on this ground that the doctrine of the omnipotence of parliament rests. It has with great propriety been said, "In England there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested."(*b*) The basis of the English constitution, the capital princi-

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(*a*) *Van Horne's Lessees* v. *Dorrance*, 2 Dallas's R. 308.

(*b*) Ibid.

ple on which all others depend, is, that the legislative power belongs to parliament alone. That is to say, the power of establishing laws, of abrogating, changing, or explaining them.(*a*)

§ 399. In America the case is widely different. Every state in the Union has its constitution reduced to written exactitude and precision. The constitution is the form of government delineated by the mighty hand of the people, in which certain just principles of fundamental law are established. The constitution is certain and fixed, it contains the paramount will of the people, and is the supreme law of the land, paramount to the power of the legislature, and can only be revoked or altered by the same power that framed it. The life-giving principle and the death-giving stroke must proceed from the same hand. The constitution is the wish and will of the people themselves in their original, sovereign, and unlimited capacity, while statute law is the work of the legislature, in their derivative and subordinate capacity. The one, the work of the creator, the other, of the creature. The constitution fixes the limits to the legislative exercise of authority, and describes the orbit within which it must move.(*b*)

§ 400. The question of the power of courts to declare a law void, on the ground of its conflict with the fundamental law, arose at a very early period of our history, it was considered with becoming deference, and decided by a far sighted and an independent judiciary. As early as 1791 the circuit court of the United States, for the district of New York, in *Hayburn's case*, declared an act of congress, assigning certain ministerial duties, to the circuit courts of the United States, to be unconstitu-

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(*a*) Steph. Eng. Comm. vol. ii. 531.

(*b*) *Van Horne's Lessees* v. *Dorrance*, 2 Dallas's R. 308.

tional.(*a*) In Pennsylvania and North Carolina, the circuit courts of the United States within those districts also held the same act not binding upon them, because the legislature had no power to assign to them duties not judicial.(*b*) In 1797, Judge Patterson assented to the duty of the court, and the paramount authority of the constitution. He said, "The constitution of a state is stable and permanent, not to be worked upon by the temper of the times, not to rise and fall with the tide of events, notwithstanding the competition of opposing interests, and the violence of contending parties, it remains firm and immovable as a mountain amid the strife of storms, or as a rock in the ocean amid the raging waves. That it was a clear position, if a legislative act opposes a constitutional principle, the former must give way and be rejected on the score of repugnance. It was the duty of the court in such a case to adhere to the constitution, and to declare the act of the legislature null and void."(*c*)

§ 401. In 1803, this question again came under consideration in the Supreme Court of the United States, when Marshall, J., said, "The question whether an act repugnant to the constitution can become the law of the land, is a question deeply interesting to the United States. That the people have an original right to establish for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom

(*a*) 1 Kent's Com. 450.
(*b*) *Case of Hayburn's*, 2 Dallas's R. 410.
(*c*) *Van Horne's Lessees* v. *Dorrance*, 2 Dallas's R. 309.

act, they are designed to be permanent. This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act. Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall choose to alter it.(*a*)

§ 402. "In the United States, the principle in the English government, that the parliament is omnipotent, does not prevail; though, if there be no constitutional objection to a statute, it is with us as absolute and uncontrollable as laws flowing from the sovereign power, under any other government.(*b*) But in this, and in all other countries, where there is a written constitution, designating the powers and duties of the legislature, as

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(*a*) *Marbury* v. *James Madison*, 2 Dallas's R. 175.
(*b*) 1 Kent's Com. 426.

well as of the other departments of government, an act of the legislature may be void as being against the constitution. The law with us must conform, in the first place, to the constitution of the United States, and then to the subordinate constitution of its particular state; and if it infringes the provisions of either, it is so far void. The courts of justice have a right, and are in duty bound, to bring every law to the test of the constitution, and to regard the constitution, first of the United States, and then of the subordinate constitution of its particular state, as the paramount and supreme law, to which every inferior or derivative power and regulation must conform. The constitution is the act of the people, speaking in their original character, and defining the paramount conditions of the social alliance; and there can be no doubt on the point with us, that every act of the legislative power, contrary to the true intent and meaning of the constitution, is absolutely null and void.

§ 403. The judicial department is the proper power in the government to determine whether a statute be, or be not constitutional. The interpretation or construction of the constitution, is as much a judicial act, and requires as much legal discretion, as the interpretation or construction of a law. To contend that courts of justice must obey the requisitions of an act of the legislature, when it appears to them to have been passed in violation of the constitution, would be to contend that the law was superior to the constitution, and that the judges had no right to look into it and regard it as the paramount law. It would be rendering the power of the agent greater than that of his principal, and be declaring that the will of only one concurrent and co-ordinate departments of the subordinate authorities under the constitution, was absolute over the other departments, and competent to control, according to its own will and pleasure, the whole fabric of the government

and the fundamental laws on which it vested. The attempt to impose restraints upon the exercise of the legislative power would be fruitless, if the constitutional provisions were left without any power in the government to guard and enforce them." Chancellor Kent has justly said: "From the mass of powers necessarily vested in the legislature, and the active and sovereign nature of those powers; from the numerous bodies of which the legislature is composed, the popular sympathies which it excites, and its immediate dependence on the people, by the means of frequent periodical elections, it follows that the legislative department of the government will have a decided superiority of influence. It is constantly acting upon all the great interests in society, and agitating its hopes and fears. It is liable to be constantly swayed by popular prejudice and passion, and it is difficult to keep it from pressing with injurious weight upon the constitutional rights and privileges of the other departments. An independent judiciary, venerable by its gravity, its dignity, and its wisdom, and deliberating with entire serenity and moderation, is peculiarly fitted for the exalted duty of expounding the constitution, and trying the validity of statutes by that standard. It is only by the free exercise of this power, that courts of justice are enabled to repel assaults, and to protect every part of the government, and every member of the community, from undue and destructive innovations upon their chartered rights. It has accordingly become a settled principle in the legal polity of this country, that it belongs to the judicial power, as a matter of right and of duty, to declare every act of the legislature made in violation of the constitution, or of any provision of it, null and void."(*a*) The question whether a law is void

(*a*) 1 Kent's Com. p. 450.

for its repugnancy to the constitution, is at all times, a question of much delicacy, which ought seldom, if ever, to be decided in a doubtful case. It is not on slight implication and vague conjecture, that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void. The opposition between the constitution and the law should be such, that the judge feels a clear and strong conviction of their incompatibility with each other.(*a*) In one case,(*b*) Buchanan, Ch. J., remarks: "It has been said, that a legislative act should not be pronounced unconstitutional or invalid, in a doubtful case; nor should it, where the doubt is *bona fide*, and well founded, and not the result of disinclination to deny the authority of the legislature, which all must feel, which none should yield to in violation of a solemn duty. But where a judge is satisfied, upon full consideration, that an act of the legislature is contrary to the constitution of the United States, the supreme law which he is bound to obey, and which must prevail over any act that comes in conflict, and cannot stand with it, or is for any other reason invalid, he has no choice; and all that is left for him, is honestly and fearlessly to do his duty, from the faithful discharge of which, however unpleasant the task, no upright judge can shrink, if he will. On the other hand, a judge should not suffer himself to be betrayed to pronounce an act unconstitutional or invalid, on insufficient grounds, by a morbid apprehension that a contrary decision might be ascribed to the want of a proper sense of judicial duty."

(*a*) *Fletcher* v. *Peck*, 6 Cranch R. 87.

(*b*) *The Regents of the University of Maryland* v. *Williams*, 9 Gill & Johns. 383.

CHAPTER X.

OF LEGISLATIVE AND JUDICIAL INTERPRETATION.

§ 404. Having in the preceding chapter considered the origin and history of legislation, and the subject of legislative power, we shall now enter upon the second subdivision of our subject, that, of the construction of statutes. The question of the bounds of legislative and judicial interpretation, lies at the threshold of this part of our inquiries, and is one claiming the consideration of all whose duty it is to interpret the statute laws of a nation, which in this country, constitutes the greatest part of our entire judicial system. It should be the aim of judges, in all cases, to keep within the legitimate bounds of interpretation, and studiously to avoid such latitude of interpretation as would amount to judicial legislation, rather than judicial interpretation. In all that we shall annote on this subject we are indebted to the pen of the English author on statutes, Mr. Dwarris.

§ 405. It is a remarkable fact, that in an enlightened age, and among so many intelligent inquirers into the philosophy, both of history and of law, so little attention should have been paid to the consideration of the important question,—What are the principles upon which the jurisprudence of a country ought to proceed? Certainty in the law, to a positive extent, is unfortunately unattainable; immutability of laws, even if it were desirable, (which it surely is not) is still more impracticable. An extensive alteration in the condition of the people,—a total change of circumstances, must, at any time, induce some change of institutions, and render ab-

solutely necessary a sensible modification of the laws. Laws must be accommodated—or laws will accommodate themselves—to the growing necessities of mankind, and the varying state and condition of human society. "Comment enchaîner l'action du temps? Comment s'opposer au cours des événements, ou à la pente insensible des mœurs? Comment connaître et calculer d'avance ce que l'expérience seule peut nous révéler? La prévoyance peute-elle jamais s'étendre a des objets que la pensée ne peut atteindre?—Les hommes ne se reposent jamais; ils agissent toujours: et ce mouvement, qui ne s'arrête pas, et dont les effets sont diversement modifiés par les circonstances, produit, à chaque instant, quelque combinaison nouvelle—quelque nouveau fait,—quelque résultat nouveau.(*a*)

§ 406. Again, with the highest degree of certainty of which laws are susceptible, doubts will still arise upon the sense of enactments, or as to their application. In all cases where the legislature has not defined with perfect precision the exact nature of the subject of its provisions, some authority will be required to decide upon the meaning of the terms which it employs, or the cases to which its provisions shall extend.

§ 407. In ancient times, cases of the first impression, and all matters presenting any serious doubt or difficulty, were usually "adjourned into parliament, to be resolved and decided there."(*b*) To this effect Bracton observes, —"Si aliqua nova et inconsueta emerserint quæ nunquam prius evenerunt, et obscurum et difficile sit eorum judicium, tunc ponantur judicia in respectu usque ad Magnam Curiam, ut ibi per consilium curæ terminetur."(*c*) For the high court of parliament met every

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(*a*) Discours Préliminaire du premier projet de Code Civil, p. 29.

(*b*) 2 Inst. 408.

(*c*) Bracton, li. 1, ca. 2.

year, "or oftener if need was," for the "maintenance and execution of the laws."(*a*)

§ 408. In like manner it has been said in modern times, (and the sentiment has been before noticed with approbation,) parliament is always at hand, to supply deficiencies and to correct mistakes.(*b*) Is the legislature, then, to be interrogated, every time a doubt arises upon the construction of a statute, to decide particular disputes? Assuredly not. For would not this be endless? Would it not impair the usefulness, and derogate from the dignity of the judicature? Would it not give room for partiality and oppression? "Forcer le magistrat de recourir au législateur, ce serait admettre le plus funeste des principes; ce serait renouveler parmi nous la désastreuse législation des Rescrits. Car, lorsque le legislateur intervient pour prenoncer sur des affaires nées et vivement agittées entre particuliers, il n' est pas plus à l' abri des surprises que les tribunaux." And under such circumstances certainly; "On a moins a redoubter l' arbitraire réglé, timide et circonspect d' un magistrat que peut être réforme, et qui est soumis a la action en forfaiture, que l' arbitraire absolu d' un pouvoir indépendant, qui n' est jamais responsable. Des lois intervenues sur des affaires privées seraient souvent suspectes de partialites et toujours elles seraient rétroactives et injustes pour ceux dont le litige aurait précédé l' intervention de ce lois. De plus, le recours au législateur entraineraît des longeurs fatales au justiciable," &c.(*c*)

§ 409. It follows, that the questions of construction before adverted to,—viz. the meaning of the terms employed by the legislature, and the cases to which the provisions of the law are applicable, must be left to the

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(*a*) 4 E. 3, ca. 14; 36 E. 3, ca. 20. (*c*) Discours Préliminaire, &c., p. 26.
(*b*) Dwarris on Statutes, p. 721.

decision of the judges. If the judges of the inferior courts are mistaken in their construction of a law, their decision must be reviewed and corrected by the courts of superior jurisdiction. But by what maxims are the judges of both courts to be guided in their expositions,—on what ground will their determinations rest? Are the courts to proceed upon established principles—to be governed by fixed rules; or, exercising a liberal discretion, to have recourse, in doubtful cases, to natural principles,—to aid and to moderate the law according to equitable considerations,—to include in their deliberations those cases and circumstances, which the legislator himself would have expressed, had he foreseen them?

§ 410. To an English lawyer, brought up with a sober veneration of the wise maxim, (so consonant to the spirit of our constitution, and so constantly to be traced pervading the whole body of our jurisprudence,)—that *Optima est lex, quæ minimum relinquit arbitrio judicis, optimus judex, qui minimum sibi*,(*a*) the question would seem to present little difficulty. An English judge, however, would be in no slight degree astonished, at finding it laid down as a dogma of law, as in the fourth article of the Titre préliminaire de la publication des Lois:—"Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité, ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice."(*b*) On which law, the following passage in the Discours Préliminaire(*c*) may be considered as a commentary:—"Sur le fondement de la maxime qui les juges doivent obéir aux lois, et qu'il leur est défendu de les interpreter, les tribunaux, dans ces dernieres années, renvoyaient par des référés les justiciables au pouvoir

(*a*) Aphorism, 46; Bacon's Works, vol. 7, p. 148.
(*b*) P. 26, Titre Préliminaire.
(*c*) P. 25. Discours Préliminaire.

législatif, toutes les fois qu'ils manquaient de loi, ou que la loi existante leur parassait obscure. Le tribunal de cassation a constamment réprimé cet abus, comme un déni de justice." From which important passage it is to be collected, that even among our enlightened neighbors, and at a very recent period, the boundaries of legislation and of judicial interpretation were so vaguely defined, and so imperfectly understood, that the judges were constantly either mistaking the principles, or erring in the application of them.

§ 411. The doctrine laid down in the fourth article of the Titre Préliminaire, before cited, will probably appear to the ordinary reader, even in its present shape, not a little calculated to produce the effect which the Consul Cambacérès denounced as the probable result before the adoption of an amendment suggested by him to control it:—"peut faciliter les usurpations des tribunaux sur le pouvoir législatif.(*a*) The explanations, however, of this article, which were afforded during the discussion of the *projet*, are highly valuable.(*b*)

§ 412. Le Minister de la Justice dit, "qu'il y a deux sortes d'interpretations, celle de legislation et celle de doctrine; que cette derniere appartient essentiellement aux tribunaux; que la premiere est celle que leur est interdite; que lorsqu'il est défendu aux juges *d'interpreter*, il est évident que c'est de *l'interpretation legislative* qu'il s'agit. Il cite l'art. VII., du titre 1^er^ a de l'ordonnance de 1667, qui défend aux juges d'interpreter les ordonnances." *Le C. Tronchet* dit, "que l'on a abusé, pour réduire les juges à un état purement passif, de la défense que leur avait faite l'assemble constituante, d'interpréter des lois et de réglementer. Cette défense

(*a*) Deuxieme rédaction, séance de 14 therm. an IX.
(*b*) Titre Préliminaire, p. 28.

n' avait pour objet que d' empêcher les tribunaux d' exercer une partie de pouvoir législatif, comme l' avaient fait les anciennes cours, en fixant le sens des lois par des interprétations abstraites et générales, ou en les suppléant par des arrêts de reglement. Mais, pour éviter l' abus qu' on en a fait, il faut laisser au juge l' interpretation, sans laquelle il ne peut exercer son ministere. En effet, les contestations civiles portent sur les sens différent que chacune des parties prête a la loi; ce n' est donc pas par une loi nouvelle, mais par l' opinion du juge, que la cause doit être décidée. On craint que les juges n' en abusent pour juger contre le texte de la loi; s' ils se le permettaient, le tribunal de cassation anéantirait leurs jugements." *Le C. Rœderer* dit, "que l' article IV. donne trop de pouvoir au juge, en l' obligeant de prononcer même dans le silence de la loi. Il appartient au judge d' appliquer la loi; il ne lui appartient pas de remplir les lacunes de la législation, quand la loi garde un silence absola." *Le C. Portalis* repond, "que le cours de la justice serait interrompu, s' il n' etait permis aux juges de prononcer que lorsque la loi a parlé. Peu de causes sont susceptibles d' être décidées d' apres une loi, d' apres une texte précis; c' est par les principes généraux, par la doctrine, par la science du droit, qu' on a toujours prononcé sur la plupart des contestations.—En matiere criminelle le juge ne doit prononcer que lorsque la loi a qualifié de délit le fait qui est déféré a la justice, et qu' elle y attache une peine; en matiere civille au contraire, le juge ne peut se refuser a prononcer indistinctement sur toutes les causes qui lui sont présentées, parceque, s' il ne trouve pas dans la loi de regles pour décider, il doit recourer a l' équité naturelle. Ce serait trop multiplier les lois, que de les faire naitre des doutes des juges."

§ 413. It is necessary to bear these explanations in mind in perusing the following passages from the mas-

terly discourse prefixed to these *Discussions sur le Code Civil;* and it is not less important to remember that in all civilized countries except England,(*a*) the jurisdiction of common law and of equity is committed to the *same* courts, and that, by blending law and equity together, greater latitude is given to the judges in matters of property, to mould and adapt, that is, (discarding figurative language,) without absolutely altering, to modify, the laws, in order to meet the purposes of justice in particular cases, than where the judges are bound by settled rules. With us, even in the courts of equity, which are supposed in some instances, to admit of determinations according to conscience, and *arbitrium boni viri*, it has been a question with enlightened lawyers, how far this most liberal description of equitable jurisdiction should be permitted; and whether courts of equity ought not to be, in all cases, governed by general rules. On the one hand it is admitted, that if this were the case, the consequence would inevitably follow, that a judge would sometimes be bound to pronounce decrees which would be materially unjust; since no rule can be equally just in the application to a whole class of cases, that are far from being the same in every circumstance. But on the other hand, it has been thought, that even this dreadful evil should be tolerated, to avoid a greater;—that of rendering judges arbitrary, and their decrees so fluctuating, that the public could never trust to them as a rule of conduct.(*b*)

§ 414. The observations of Lord Hardwicke upon this subject, (of the establishment of general rules in our courts of equity,) are entitled to great attention, and his remarks upon the subject of frauds, seem quite conclusive upon that part of the subject. "Some general rules

(*a*) Some of the American states also.

(*b*) Lord Kame's Principles of Equity.

there ought to be, for otherwise, the great inconvenience of *jus vagum et incertum* will follow; and yet the *Prætor* must not be so absolutely and invariably bound by them, as the judges are by the rules of the common law. In the construction of trusts, which are one great head of equity jurisdiction, the rules are pretty well ascertained; so they are in cases of redemption of mortgages, which makes another great branch of that business. But as to relief against frauds, no invariable rules can be established. Fraud is infinite, and were a court of equity once to lay down rules, how far they would go, and no farther, in extending their relief against it, or to define strictly the species, or evidence of it, the jurisdiction would be cramped, and perpetually eluded by new schemes, which the fertility of man's invention would contrive."(*a*)

§. 415. In the same letter, but in the handling of a different topic, (which will be the subject of notice hereafter,) Lord Hardwicke expresses a decided feeling against a measure, the tendency of which would be to make the judges of the common law, law-makers in matters of property. Not so, *mutatis mutandis*, the French codifiers; by whom some contempt is indicated, for the practical wisdom of those qui osent prescire impérieusement au législateur la terrible tâche de ne rien abandonner a la décision du juge. Quoi que l'on fassé,—proceeds the same profound and analytical discourse,(*b*)—les lois positives ne sauraient jamais entierement remplacer l'usage de la raison naturelle dans les affaires de la vie; les besoins de la société sont si variés, les communication des hommes est si active, leurs interests sont

(*a*) Letter to Lord Kames; Lord Woodhouslee's Memoirs of the Life and Writings of Lord Kame. Parke's History of the Court of Chancery, Appendix No. 4.

(*b*) Discours Prelim. p. 20.

si multipliés et leur rapports si étendus, qu' il est impossible au legislateur de pourvoir a tout. Dans les matieres mêmes qui fixent particulierement son attention, il est une foule de détails qui lui echappent, ou qui sont trop contentieux et trop mobiles pour pouvoir devenir l' objet d' un texte de loi. Une foule de choses sont donc nécessairement abandonnés a l' empire de l' usage, à la discussion des hommes instruits, à l' arbitrage des juges. L' office de la loi est de fixer, par de grandes vues les maximes générales de droit; d' établir des principes feconds en consequences, et non descendre dans le detail des questions qui peuvent naitre sur chaque matiere. Cest du magistrat et au jurisconsulte pénétrés de l' esprit général des lois, à en diriger l' application. De là, chez toutes les nations policées, ou voit toujours se former, à côté du sanctuaire des lois, et sous la surveillance du législateur un depôt de maximes, de décisions et de doctrine qui s' epure journellement par la practique et par le choc des débats judiciaires qui s' accroît sans cesse de toutes les connoisances acquises, et qui a constamment été regardé comme le vrai supplément de legislation. Il serait, sans doute, desirable que toutes les matieres pussent être rêglées par des lois. Mais à défaut de texte precis sur chaque matiere, un usage ancien, constant et bien establi, une suite non interrompue de decisions semblables, une opinion ou une maxime reçue, tiennent lieu de loi. Quand on n' est dirigé par rien de ci qui est établi ou connu, quand il s' agit d' un fait absolument nouveau, on remonte aux principes du droit naturel. Car, si la prévoyance des législateurs est limitée, la nature est infinie; elle s' applique a tout ce qui peut intéresser les hommes. Pour combattre l' authorité que nous reconnaisons dans les juges, de statuer sur les choses que ne sont pas déterminées par les lois, on invoque le droit qu' a tout citoyen de n' être jugé que d' apres une

loi antérieure et constante. Ce droit ne peut être méconnu. Mais pour son application, il faut distinguer les matieres criminelles d' avec les matieres civiles, &c. En matriere criminelle où il n' y a qu' un texte formel et pré-existant qui puisse fonder l' action du juge, il faut des lois précises et point de jurisprudence. Il en est autrement en matiere civile: là, il faut une jurisprudence parce qu' il est impossible de regler tous les objets civils par des lois. Quand la loi est claire, il faut la suivre; quand elle est obscure il faut en approfrondir les dispositions. Si l' on manque de loi il faut consulter l' usage ou l' équité. L' Equité est le retour a la loi naturelle, dans le silence, l' opposition ou l' obscurité des lois positives.

§ 416. The tenor of these passages, (for the citation of which, from so interesting a work, no apology is considered necessary to the intelligent reader,) may, perhaps, be thought in some measure, to confirm Bacon's sagacious opinion:—"Apud nonnullos receptum est, ut jurisdictio quæ decernit secundum æquum et bonum atque illa altera quæ procedit secundum jus strictum, iisdem curiis deputentur; apud alios autem, ut diversis:—Omnino placet curiarum separatio. Neque enim servabitur distinctio casuum, si fiat commixtio jurisdictionum; sed arbitrium legem tandem trahet." Does not this effect appear to be produced;—arbitrium legem trahere?(*a*)

§ 417. Where so much is left to the discretion of the judges, it is desirable to know, whether any rules are prescribed for their government, and the guidance of that extensive discretion. The introductory discourse, so often already quoted, observes upon this head, and very judiciously:(*b*) Il est trop heureux qu' il y ait des re-

(*a*) De Aug. Scient. lib. 8, cap. 3, aph. 45.
(*b*) Tit. Prel. p. 23.

cueils, et une tradition suivie d'usages, de maximes, et de regles, pour que l'on soit, en quelque sorte, necessité a juger aujourd'hui, comme on a jugé hier, et qu'il n'y ait d'autres variations dans les jugements publics que celles qui sont amenés par le progrès des lumieres et par la force des circonstances. Again, and more emphatically:(*a*) Le pouvoir judiciaire, etabli pour appliquer les lois, a besoin d'être dirigé dans cette application, par certaines regles. Nous les avons tracés: elles sont telles, que la raisan particuliere d'aucun homme, ne puisse jamais prévaloir sur la loi, raison publique. Lastly, (and no longer mediately or remotely, but directly, affecting the subject under consideration, viz. the boundaries of legislation and of judicial interpretation,) the same dissertation proceeds: En effet, la loi statue sur tous: elle considere les hommes en masse, jamais comme particuliers; elle ne doit point se mêler des faits individuels, ni des litiges qui divisent les citoyens. S'il en etait autrement, il foudrait journellement faire de nouvelles lois: leur multitude étoufferait leur dignité et nuirait a leur observation. Le jurisconsulte serait sans fonctions, et le législatueur, entraîné par les détails, ne serait bientôt plus que jurisconsulte: Les intérêts particuliers assiégeraient la puissance législative; ils la détourneraient, à chaque instant, de l'intérêt général de société. Il y a une science pour les legislateurs: comme il y en a une pour les magistrats: et l'une ne ressemble pas a l'autre. La science du legislateur consiste à trouver dans chaque matiere les principes le plus favorables au bien commun: la science du magistrat est de mettre ces principes en action,—de les ramifier,—de les étendre par une application sage et raisonnée aux hypotheses privées; d'étudier l'esprit de la loi quand la lettre tue;

(*c*) Titre Préliminaire, p. 31.

et de ne pas s'exposer au risque d'être, tour à tour, esclave et rebelle, et de désobéir par esprit de servitude.(*a*)

§ 418. It cannot be denied, that these extracts, given from the "Discour Préliminaire du Premier Projet de Code Civil," contain a very particular and even minute enumeration of the duties of the judge; but it may be thought to be still open to inquiry, what are the functions of the legislator? The province of the legislator is shadowed out (*adumbrated*) in the following passages, indistinctly indeed, without relief, and in a manner wanting the bold and consistent aspect presented by the other parts of the work. Il faut que le législateur veille sur la jurisprudence; il peut être éclairé par elle et il peut de son côté, la corriger; mais il faut qu'il y en ait une. C'est à l'expérience à combler successivement les vides que nous laissons. Les codes des peuples se font avec le temps; mais, à proprement parler, on ne les fait pas.(*b*)

§ 419. With us it has been shown(*c*) to be the duty of the judges, where a case occurs which was not foreseen by the legislature, to declare it *casus omissus;* or where the intention, if entertained, is not expressed, to say of the legislature, *quod voluit, non dixit;* or where the case, though within the mischief, is not clearly within the meaning; or where the words fall short of the intent,—or go beyond it;—in every such case it is held the duty of the judge, in a land jealous of its liberties, to give effect to the expressed sense, or words, of the law, in the order in which they are found in the act, and according to their fair and ordinary import and understanding.

§ 420. As to deciding contrary to the plain words of

(*a*) Titre Préliminaire, p. 27.
(*b*) Ib.
(*c*) Dwarris on Statutes, chap. 12.

an act of parliament,—as to holding that the legislature did not mean what it has unequivocally expressed,—it may be observed that if with decided cases, the maxim of law be, (as it incontrovertibly is,) *stare decisis*, if the courts feel themselves bound by the positive authority of a solemn determination of the same question by former judges; *a fortiori* ought they to be concluded by the more positive authority of an act of parliament. As to the weight of authority,—the influence justly due to the codes of France, Prussia, Bavaria, the Netherlands, &c., considered as a question of general jurisprudence,—the Code Napoleon, with which we have the opportunity of being the best acquainted, has been a source of endless litigation. The controversies and discussions to which it has given rise are innumerable; the commentaries upon it would already fill a library;—the result of forming a new system, depending upon general rules, which it is left to the judges to interpret and apply.

§ 421. The duty of the judge is to adhere to the legal text, as his sole guide. The legislator also, has his important rights and solemn duties. Where there has been an omission in an act,—or where his intention has been misconceived, and the remedy, in consequence, carried too far, or not given full effect to, he may supply deficiencies,—may state his own meaning with greater precision, and guard, for the future, against an application of the remedy more extensive than the intention. But—poor and limited would be his sphere, were it confined to these functions. The higher province and duty of the legislator, is to exercise a *surveillance* over something more than the mere judicature of the country,—over the objects, as well as the administration, of the laws,—over the history of man and the progress of society. Silently but vigilantly it is incumbent upon him to watch the spirit of the age,—the growth of feelings,—the development of principles,—the changes of every

kind produced by time,—the demand for different laws to protect newly-created species of property,—the cases in which judges are found lamenting the want of a law adapted to existing circumstances,—the instances in which society is felt to be disturbed by laws utterly unsuitable,—the retention of antiquated forms—or the infliction of unprofitable severities.

§ 422. No intelligent man will deny that, with us, the laws have, in a succession of ages, been gradually adapted to the free institutions of the country. Beyond all question, we are extensively indebted to the liberality of the judges, for much of the regulated freedom we at present enjoy. No reflecting man can fail to perceive that there has been the greater facility in making this adaptation, in as far as our laws were unwritten, and therefore, in a certain sense, unascertained. So far, good has unquestionably resulted from our laws being in an unsettled state. From not being more formally prescribed, the laws were less certain—from being less certain, they admitted of being rendered more complete.

§ 423. But, where the law *is* prescribed and promulgated as the declared will of the supreme power in the state, the case is wholly different. Supposing the written law to require change or modification, it will hardly admit a question whether such alteration is to be effected in a direct manner, by the superior power that originally created the law, or indirectly, by the subordinate authority employed to give it effect, and put it in operation; and if a doubt could exist upon the subject of the comparative competency and fitness of the legislature, and of the judicature of the country, to correct its laws, recourse should in preference be had to the legislature. For the legislature intends to found its regulations upon general principles; courts of law—and still more of equity—refine upon individual cases.

§ 424. The truth is, that the legislature, and not the

courts, should be driven to comply with the necessities of mankind. But this, unfortunately, has not been the practice. When rules of law have been found to work injustice, they have been evaded instead of being repealed. Obsolete or unsuitable laws, instead of being removed from the statute book, have been made to bend to modern usages and feelings. Instead of the legislature framing new provisions, as occasion has required, it has been left to able judges to invade its province, and to arrogate to themselves the lofty privilege of correcting abuses and introducing improvements. The rules are thus left in the breasts of the judges, instead of being put upon a right footing by legislative enactment.

§ 425. Much of the evil just described, is no doubt attributable to the supineness of the legislature,—something to the narrowness of the rules of the common law,—but the principal share, to the want of a proper understanding at what point interpretation ought to end, and legislation should begin.(*a*) Let the discriminating reader look at Burke s eloquent panegyric upon Lord Mansfield, and then ask himself soberly, whether every improvement the orator ascribes to the judge, however unquestionably meritorious, is not within the province, and ought not to have been effected by the intervention of the legislature? "He sought," it is said, "to effect the amelioration of the law, by making its liberality keep pace with justice and the actual concerns of the world, and not restricting the infinitely diversified conditions of men, and the rules of natural justice, within artificial circumscriptions, but conforming its principles to the growth of our commerce and our empire."

§ 426. As to the assumptions of jurisdiction by the

(*a*) Butler's Reminis. vol. 1.

court of chancery, it will be more satisfactory to rest upon the admissions of its ornament, as well as apologist, Lord Hardwicke; than to refer to the opinion of Mr. Humphreys, its less ardent admirer, that "its acts have been rather legislative than judicial."(*a*) "New discoveries and inventions in commerce," says Lord Hardwicke, in a letter to Lord Kames before referred to, "have given birth to new species of contracts; and these have been followed by new contrivances to break and elude them, for which the ancient simplicity of the common law had adapted no remedies; and from this cause, courts of equity, which admit of a greater latitude, have, under the head *adjuvandi, vel supplendi juris civilis*, been obliged to accommodate the wants of mankind.

§ 427. Another source of the increase of business in the courts of equity has been, the multiplication and extension of trusts. New methods of settling and incumbering landed property have been suggested by the necessities, extravagance, or real occasions of mankind. But what is more than this, new species of property have been introduced, particularly by the establishment of the public funds, and various transferrable stocks, that required to be modified and settled to answer the exigencies of families, to which the rules and methods of conveyancing would not ply or bend. Here the liberality of courts of equity has been forced to step in and lend her aid." Thus it appears, that these objects, rendered necessary by a change of circumstances, have been effected *by equitable interference;* that is, in truth, by judicial refinement, and not by the seasonable enactment of salutary laws. Instead of the encroachment upon the common law, of which Bacon was apprehensive, it seems that the Prætorian courts(*b*) overflowed their banks in

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(*a*) Humphrey's Observations on the Laws of Real Property, &c.

(*b*) Maxime omnium interest certitudinis legem, ne curiæ prætoriæ intumes-

an opposite direction, and, while sparing of injunctions, openly invaded the province of the legislature. Upon a careful investigation of the course actually pursued, it will be found that, in general, inconvenient laws were set aside, and required changes were effected, by the use of technical fictions and contrivances to evade inconsistent rules; and if there was a lamentable want of politic institution, there has been thought to have been also, at times, some defect of judicial principle. Mr. Butler is decidedly of opinion, as regards the ascertaining and obtaining the proper boundary of interpretation and legislation, that the French courts of justice have shown greater moderation than our own, in the exercise of this important branch of judicature.(*a*) It certainly is a remarkable fact, that the jurisdiction or methods of proceeding, in all our superior courts, will be discovered, on inquiry, to be founded in usurpation, and sustained by fiction.

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cant et exundent in tantum, ut prætextu rigoris legum mitigandi, etiam robur et nervos iis incidant aut laxent, omnia trahendo ad arbitrium.—Aphorism, 43.

(*a*) Reminis. vol. 1.

CHAPTER XI.

DIVISION, DURATION, QUALITIES, AND INCIDENTS OF STATUTES.

§ 428. Statute law is the rule which is ordained or prescribed by the supreme power of the state, or the legislative department of the government. Statutes are divided into two classes; to wit, public and private; and these are remedial, or penal, affirmative, or negative. The parts of a statute, in its popular sense, are, the title, preamble, the purview or body of the act, the proviso, the saving clause, and the exceptions. Although in a strict sense, the title and preamble are not considered as a part of a statute. These classes of statutes and parts of statutes will come under review in a subsequent part of this work. Before proceeding to the consideration of the general doctrine of the construction of statutes, it is proper that we should submit some observations of a general character, (as preliminary to our main design,) which relate to the duration, qualities, and incidents of statutes.

§ 429. In regard to the duration of statutes, some are temporary, others are perpetual. Every statute, for the continuance of which no time is limited, is perpetual, although it be not expressly declared so to be. A temporary statute continues in force, unless it is sooner repealed, until the time for which it is made expires. Although an offence should have been committed before the expiration of an act, the party cannot be punished after it has expired, unless a particular provision be made by law for that purpose. On this account a tem-

porary statute is sometimes made to continue in force, after it has ceased to operate substantially, for the purpose of supporting prosecutions against those who have violated it during the term assigned for its continuance.

§ 430. Statutes are the declared will of the supreme power of the state, which, unless repugnant to the laws of God, and natural justice, all subjects are bound to obey. Created by the exercise of the highest authority which the constitution acknowledges, they cannot be dispensed with, altered, amended, suspended, or repealed, but by the same authority by which they were made. The life-giving principle and the death-going stroke must emanate from the same hands; for it is a maxim of the law, "*conveniens naturali æqitati unumquodque dissolvi eo ligamine, quo ligatum est.*"

§ 431. In regard to the qualities and incidents of statutes, a statute binds all persons but such as are specially saved by it.(*a*) The government itself, however, is not to be restrained of a liberty, or right it had before, by the general words of a statute, if it be not named in the act, but if a statute be intended to give a remedy against a wrong,(*b*) to prevent fraud,(*c*) tortious usurpations, or the decay of religion, the government, though not named, will be bound by the act. In England, if an act of parliament do not name the king, he is bound by acts for the advancement of religion, or learning, or for providing for the poor. And if an act speak of the king generally and indefinitely, it extends to all his successors, and to a queen if the crown descend to a female.(*d*)

§ 432. A statute which gives corporeal punishment, does not bind an infant, contra of other statutes, if they do not except the infant.(*e*) A statute cannot alter by

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(*a*) And. 148, pl. 82.
(*b*) 6 Inst. 681.
(*c*) 5 Rep. 14, *b*.
(*d*) 12 Rep. 110.
(*e*) 2 Inst. 55.

reason of time, but the common law may, since *cessante ratione cessat lex.*(*a*) When statutes are made, there are some things which are exempted and foreprised out of the provisions thereof by the law of reason, though not expressly mentioned; thus, things, for necessity's sake, or to prevent a failure of justice, are excepted out of statutes.(*b*)

§ 433. Whenever an act gives any thing generally, and without any special restriction declared, or rationally to be inferred, it gives always subject to the general control and order of the common law.(*c*) Whenever a statute gives or provides any thing, the common law provides all necessary remedies and requisites.(*d*) In statutes incidents are always supplied by intendment, in other words, whenever power is given by a statute every thing necessary to make it effectual is given by implication; for the maxim is, *Quando lex aliquid concedit concedere videtur et id, per quod devenitur ad illud.*(*e*) Thus, a statute giving an action for waste, to one as tenant for life, or for years, impliedly gives authority to him in reversion, by himself or by another, to enter to see if any waste be done.(*f*) Upon the same principle, in an action of waste, given by a statute repealed, against tenant in tail, after possibility of issue extinct, treble damages were held recoverable, although not mentioned:(*g*) for such damages were recoverable under a prior statute, by which an action of waste was given; and whenever an old action is given in a new case, all that before appertained to the action is likewise given.

(*a*) Dwarris on Statute, 662.
(*b*) Plow. Comm. 13 b. 2 Inst. 118.
(*c*) *Rex* v. *Bishop of London*, 2 Show. 455.
(*d*) *The Protector* v. *Ashfield*, Hard. 62.
(*e*) 2 Inst. 306. 12 Rep. 130, 131.
(*f*) Bro.; Waste, pl. 68.
(*g*) Ibid.

§ 434. There are certain common law maxims, that aid in the application of statutes to given cases. *Quando aliquid prohibetur, prohibetur et omne, per quod devenitur ad illud.* Magna Charta says, no man *aliquo modo destruatur nisi, &c.*, by which every oppression against law, by color of any usurped authority, is forbidden, and by these words, all things by any manner of means tending to destruction are prohibited, as if a man be accused or indicted of treason or felony, his lands and goods cannot be granted to any, no not so much as by promise, before attainder; for, when a subject obtaineth a promise of the forfeiture, many times undue means and more violent prosecution is used for private lucre, tending to destruction, than the just and quiet proceedings of the law would permit.(*a*) Whenever the provision of a statute is general, every thing which is necessary to make such provision effectual is supplied by the common law.(*b*) If an offence be made felony by a statute, such statute, by necessary consequences, subjects the offender to the like attainder and forfeiture, and requires the like construction, as to those who shall be accounted accessories before or after the fact, and to all intents and purposes, as a felony at common law does.(*c*) Misprison of felony is as well incidental to a felony created by a statute as to one of the common law.(*d*)

§ 435. *Lex uno ore omnes alloquitur*,(*e*) Lord Coke says: "This maxim is the pride of the English law; and it is pre-eminently so of the written law, which lays down one clear and certain rule for all descriptions of persons, and is both known and invariable. For the

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(*a*) 5 Inst. 48. Steph. L. Elec. 14.
(*b*) 1 Inst. 235. 2 Inst. 222. Bac. Abr. title Statute.
(*c*) 3 Inst. 47, 49, 50. 1 Hawk. c. 41, § 4.
(*d*) 1 S. Elec. L. 14.
(*e*) 2 Inst. 1847.

written and statute law, being of old duly and formally promulgated to the people, could never be what Lord Bacon says of Henry the Seventh's laws, "as a *nemo scit*," and of these rules of conduct no judge, producing a manuscript decision, can say, Lo! I have the law in my side pocket."(*a*)

§ 436. No one can be punished without an injury or fault having been committed. *Nemo punitur sine injuria, facto sine defalto.* Where a statute provided that, in case of a disseisor alienating lands, and not being able to satisfy the damages, they to whose hands the lands and tenements shall come should be charged with the damages, &c. Now, if the tenant cometh to the lands by act of law, which he cannot withstand, and where there is no act or default on him, he shall not be charged. For instance, if the disseisor aliened to A. and his heirs, and A. dieth without heirs, the law cast the land upon the lord, to the end that there may be a tenant to the præcipe. In this case, if the lord doth not take any profits of land, in a suit brought against him for the land, the lord may plead the special matter, and to discharge himself from damage; for although he be tenant of the land, yet he is no tenant, (against his will) within the meaning of this statute, because there is no wrong or default in him.(*b*)

§ 437. *Actus legis nemini est damnosus.* An act of law is damage to no one. Where an act for enlarging the term granted to a patentee for the enjoyment of his patent, provided that in case the power, privilege, or authority granted by the letters patent should become vested in more than five persons, or their representatives, at any one time, otherwise than by devise, or succession, all liberties, privileges, &c., should cease. The paten-

(*a*) Watkins on Conveyances, preface. 1 Steph. Ele. L. 14.
(*b*) 2 Inst.

tees having become bankrupts, it was held, that this clause applied only to an assignment by act of the party, and not to an assignment by operation of law.(*a*) *Absoluta sententia expositore non indiget.* Lord Coke says this is the case where the words are plain without any scruple, and absolute without any saving.(*b*)

(*a*) *Bloxam and another, assignees*, v. *Elsee*, 6 B. & C. 169.
(*b*) 2 Inst. 533.

CHAPTER XII.

OF INTERPRETATION AND CONSTRUCTION.

§ 438. We shall now enter upon the main and most important question which arises under this branch of our subject—that of interpretation and construction of statutes. Under this head, we shall have occasion, in the prosecution of our inquiries, to go somewhat into the doctrines and rules adopted by ethical writers, and writers upon the civil law, and incidentally, to some extent consider the rules that obtain in the interpretation, and construction of written instruments, and commercial contracts. We should remark, however, that the rules adopted in the latter class of instruments, do not always prevail in the construction of statutes.

§ 439. Interpretation and construction, when applied to statutes, have been sometimes considered as synonymous terms. Lieber, in his admirable work on Legal and Political Hermeneutics, defines interpretation thus:—"Interpretation is the art of finding out the true sense of any form of words—that is, the sense which their author intended to convey—and of enabling others to derive from them the same idea which the author intended to convey. Construction is the drawing of conclusions respecting subjects that lie beyond the direct expressions of the text, from elements known from, and given in the text—conclusions which are in the spirit, though not in the letter of the text. Interpretation only takes place if the text conveys some meaning or other. But construction is resorted to, when, in comparing two different writings of the same individual or two different enactments

by the same legislative body, there is found contradictions where there was evidently no intention at such contradictions one of another, or where it happens that part of a writing or declaration contradicts the rest. When this is the case, and the nature of the document or declaration, or whatever else it may be, is such as not to allow us to consider the whole as being invalidated by a partial or other contradiction, then resort must be had to construction. So too, if found to act in cases, which have not been foreseen by the framers of those rules, by which, we are nevertheless obliged, for some binding reason, faithfully to regulate as well as we can an action respecting the unforeseen case.

§ 440. In politics it signifies generally the supplying of supposed, or real imperfections, or insufficiencies of a text, according to proper principles and rules. By insufficiency is to be understood, both imperfect provisions for the cases, which might, or ought to have been provided for, and the inadequateness of the text for cases, which human wisdom could not foresee. He illustrates this, in the instance of the application of a very ancient charter, to cases arising out of entirely and radically new relations, which have since sprung up, and which cases nevertheless clearly belong to that province of human action for which the charter was intended. This definition of construction, in its application to text of inferior authority or importance which partially militate with the demands of superior authority, will show us, that construction is the causing of the text to agree and harmonize with the demands or principles of superior authority, although they are not, according to the immediate and direct meaning of the words constituting the text, contained in it. Thus it is construction which saves in many instances from sacrificing the spirit of the text, or the object, to the letter of it, or the means by which that object was to be obtained.

§ 441. It has been very justly said by him, that without construction, written laws, in fact any laws or other texts containing rules of action, specific or general, would in many cases become fearfully destructive to the best and wisest intentions—nay, frequently produce the very opposite of which it was purposed to effect. After laying down the rule, that the constructor is not allowed to proceed without rule, or arbitrarily, but is to draw conclusions from the elements given in the text, he holds that the proper principles of construction are those which ought to guide us in good faith and conscience, and that they may be two-fold. 1st. If the text itself is the declaration of fundamental principles, which we are bound to follow in a certain sphere of action, and of certain fundamental forms, which are to regulate our actions, in this case, construction signifies the discovery of the spirit, principles and rules that ought to guide us according to the text, with regard to subjects on which that declaration is silent, but which nevertheless belongs to its province. If, for instance, a political constitution or charter, has been adopted or granted to regulate our political actions, and a case occurs which has not been provided for, but which is of an undoubted political character, we have to search for its true spirit and act accordingly in the case under consideration. 2d. Or there may exist principles or rules of superior authority, and the problem of construction then is, to cause that which is to be construed to agree with them. In this case the principles and rules of superior authority are, the subjects that lie beyond the direct expressions of the text, mentioned in his previous definition. For instance, if a law be passed, parts of which are contrary to the fundamental law of the state, it is called construing the law, when the proper judges declare those parts to be invalid. In its most general adaptation of the term, construction

signifies the representing an entire whole from given elements by just conclusions.

§ 442. He divides interpretation into close, extensive, extravagant, limited or free, predestinated, and authentic; —close interpretation is, where for just reasons connected with the formation and character of the text, we are induced to take the words in their narrowest meaning. Extensive interpretation, *interpretatio extensiva*, is where it inclines us towards adopting the more, or most comprehensive signification of the words. Extravagant interpretation, *interpretatio excedens*, is that mode of interpreting which substitutes such meaning as is evidently beyond the true meaning, and hence not genuine interpretation. Free or unrestricted, *interpretatio soluta*, is that which proceeds simply on the general principles of interpretation in good faith, not bound by any specific or superior principle. Limited or restricted interpretation, *interpretatio limitata*, takes place, if other rules or principles than the strictly hermeneutic ones limit us. Predestinated interpretation, *interpretatio predestinata*, is that where the interpreter, either consciously or unknown to himself, yet laboring under a strong bias of mind, makes the text subservient to his preconceived views, or some object he desires to arrive at. An instance of this is where cunning and art are exerted in attempts to show that the text means something which was not, according to the interpreter's own knowledge, the meaning of the author or utterers. This latter species he denominates artful. Authentic interpretation is that which proceeds from the author or utterer of the text himself. The latter is, more properly speaking, but a declaration, and not an interpretation.

§ 443. If a legislature or monarch give an interpretation, it is called authentic, though the same individual who issued the law to be interpreted, may not give the interpretation. This proceeds upon the reason that the

successive legislators or monarchs, are considered as one and the same, making the law and giving the interpretation in their representative and not in their personal characters.

§ 444. He divides construction into close, comprehensive, transcendant or extravagant, and defines them thus:—1. Close construction is that which inclines to the directest possible application of the text, or the principles it involves, to new or unprovided cases, or to contradictory parts—in short, to words which lie beyond the words of the text. 2. Comprehensive construction is that which inclines to an extensive application of the text, or the principles which it involves to new, unprovided, or not sufficiently specific cases or contradictions. 3. Transcendant construction is that which is derived from, or founded upon, a principle superior to the text, and nevertheless aims at deciding on subjects belonging to the province of the text. Extravagant construction is that which carries the effects of the text beyond its true limits, and therefore not any longer genuine construction, as the previous species becomes of a more and more doubtful character the nearer it approaches to this. The difference between the two is, the former remains, in spite of its transcendency, within the spirit of the law, or document to be construed, whilst the latter abandons it. The learned and valuable work of this author on this subject, is one which should be perused, studied and understood by every legal student, and should find a place in every law library.

§ 445. Rutherforth divides interpretation into three kinds; literal, rational and mixed. He defines *literal* interpretation, where we collect the intention from the words only, as they lie before us. *Rational*, where the words do not express that intention perfectly, but exceed it or fall short of it, and we are to collect it from rational or probable conjecture only. *Mixed*, where the

words, though they do express the intention when they are rightly understood, are of themselves of doubtful meaning, and we are bound to have resort to like conjecture to find out in what sense they are used. In literal interpretation the rule which should govern, is, to follow that sense, both in respect of the words, and of construing them which is agreeable to common use without attending to etymological fancies or grammatical refinements. In mixed interpretation, which supposes the words to admit of two or more senses, each of which is agreeable to common usage, we are obliged to collect the sense partly from the words, and partly from conjecture of intention. The rules there adopted are to construe the words according to the subject matter, in such a sense as to produce a reasonable effect, and with reference to the circumstances of the particular act. Light may also be obtained in such cases from contemporary facts, or exposition from antecedent mischiefs, from known habits, manners, and institutions, and from other sources almost innumerable, which may justly affect the judgment in drawing fit conclusions in the particular case.

§ 446. He also says, that interpretation may be strict or large, though the same thing is not always meant when we speak of a strict or large interpretation. When common usage has given two senses to the same word, one of which is more confined, or includes fewer particulars than the other, the former is called its strict sense, and the latter, which is more comprehensive, or includes more particulars, is called the large sense. If we find such a word in a law, and we take it in a more confined sense, we are said to interpret it strictly. If we take it in its more comprehensive sense, we are said to interpret it largely. But whether we do the one or the other, we still keep to the letter of the law. But strict and large intepretations are frequently opposed to each other in a

different sense. The words of the law may sometimes express the meaning of the legislature imperfectly; they may, in their common acceptation, include more or less of their intention, and, as on the one hand, we call it a strict interpretation when we contend that the letter is to be adhered to precisely; so, on the other, we call it a large interpretation when we contend, that the words ought to be taken in such a sense as common usage will not fully justify, or that the meaning of the legislature is something different from what the words in any usage would import. In this sense a large interpretation is synonymous with what has been termed a rational interpretation, and a strict interpretation in this sense, includes both literal and mixed interpretation, and may, as contradistinguished from the former, be called a close, in opposition to a free or liberal interpretation.

§ 447. In mixed interpretation, where the intention of the legislature is expressed in their words, but the words are ambiguous, and will admit of more senses than one, so that we are forced to have recourse to rational conjecture, in order to determine in which of the senses the words are used; these conjectures may be drawn from the subject matter, or the circumstance connected with it. The reason why resort is had to the subject matter is, that we are sure, on the one hand, that the subject matter was in the mind, and on the other, that there can be no reason for thinking that any thing different from it was intended. Vattel, speaking of extensive interpretation, founded on the reason of the act, says: "The consideration of the reason of a law or promise not only serves to explain the obscure or ambiguous expressions which occur in the piece, but also to extend or restrict its several provisions independently of the expressions, and in conformity to the intention and views of the legislature or the contracting parties, rather than to their words. For, according to the remark of Cice-

ro,(*a*) the language, invented to explain the will, ought not to hinder its effect. *When the sufficient and only reason of a provision*, either in a law or a promise, *is perfectly certain, and well understood, we extend that provision to cases to which the same reason is applicable, although they be not comprised within the signification of the terms.* This is what is called extensive interpretation. It is commonly said, *that we ought to adhere rather to the spirit than to the letter.* Thus the Mahomedans justly extend the prohibition of wine, in the Koran, to all intoxicating liquors; that dangerous quality being the only reason that could induce their legislator to prohibit the use of wine. Thus also, if, at the time when there were no other fortifications than walls, it was agreed not to inclose a certain town with walls, it would not be allowable to fortify it with fossés and ramparts, since the only view of the treaty evidently was, to prevent its being converted into a fortified place. But we should here observe the same caution above recommended,(*b*) and even still greater, since the question relates to an application in no wise authorized by the terms of the deed. We ought to be thoroughly convinced that we know the true and only reason of the law or the promise, and that the author has taken it in the same latitude which must be given to it in order to make it reach the case to which we mean to extend the law or promise in question. As to the rest, I do not here forget what I have said above,(*c*) that the true sense of a promise is not only that which the person promising had in his mind, but also that which has been sufficiently declared,—that which both

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(*a*) Quid? verbis satis hoc cautum erat? Minime. Quæ res igitur valuit? Voluntas: quæ si, tacitis nobis, intelligi posset, verbis omnino non uteremur. Quia non potest, verba reperta sunt, non quæ impedirent, sed quæ indicarent voluntatem.—*Cic. Orat. pro Cæcina.*

(*b*) Vattel, sec. 287.

(*c*) Ib. 268.

the contracting parties must reasonably have understood. In like manner, the true reason of a promise is that which the contract, the nature of the things in question, and other circumstances, sufficiently indicate: it would be useless and ridiculous to allege any by-views which the person might have secretly entertained in his own mind."(*a*)

§ 448. In regard to restrictive interpretation he says: "*restrictive interpretation*, which is the reverse of *extensive interpretation*, is founded on the same principle. As we extend a clause to those cases, which, though not comprised within the meaning of the terms, are nevertheless comprised in the intention of that clause, and included in the reasons that produced it—in like manner, we restrict a law or a promise, contrary to the literal signification of the terms—our judgment being directed by the reason of that law or that promise: that is to say, if a case occurs, to which the well known reason of a law or promise is utterly inapplicable, that case ought to be excepted, although, if we were barely to consider the meaning of the terms, it should seem to fall within the purview of the law or promise. It is impossible to think of every thing, to foresee every thing, and to express everything: it is sufficient to announce certain things in such a manner as to make known our thoughts concerning things of which we do not speak: and, as Seneca the rhetorician says,(*b*) there are exceptions so clear, that is unnecessary to express them. The law condemns to suffer death whoever strikes his father: shall we punish him who has shaken and struck his father, to recover him from a lethargic stupor? shall we punish a young child, or a man in a delirium, who has lifted his hand against the author of his life? In the former case, the reason of the law does not hold good; and to the two latter it is inapplicable. We are

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(*a*) Vattel, b. 2, ch. 17, sec. 290. (*b*) Lib. iv. Declam. xxvii.

bound to restore what is intrusted to us: shall I restore what a robber has intrusted to me, at the time when the true proprietor makes himself known to me, and demands his property? A man has left his sword with me: shall I restore it to him, when, in a transport of fury, he demands it for the purpose of killing an innocent person?"

§ 449. "When a case arises in which it would be too severe and too prejudicial to any one to interpret a law or promise according to the rigor of the terms, a restrictive interpretation is then also used, and we except the case in question, agreeably to the intention of the legislature, or of him who made the promise; for the legislature intends only what is just and equitable; and, in contracts, no one can enter into such engagements in favor of another, as shall essentially supersede the duty heowes to himself. It is then presumed with reason, that neither the legislature nor the contracting parties have intended to extend their regulations to cases of this nature, and that they themselves, if personally present, would except them. A prince is no longer obliged to send succors to his allies, when he himself is attacked, and has need of all his forces for his own defence. He may also, without the slightest imputation of perfidy, abandon an alliance, when, through the ill success of the war, he sees his state threatened with impending ruin if he does not immediately treat with the enemy. Thus, towards the end of the last century, Victor Amadeus, Duke of Savoy, found himself under the necessity of separating from his allies, and of receiving law from France, to avoid losing his states. The king his son would have had good reasons to justify a separate peace in the year 1745; but upheld by his courage, and animated by just views of his true interest, he embraced the generous resolution to struggle against an extremity which might have dispensed with his persisting in his engagements.

We have said above,(*a*) that we should take the expressions in the sense that agrees with the subject or the matter. Restrictive interpretation is also directed by this rule. If the subject or the matter treated of will not allow that the terms of a clause should be taken in their full extent, we should limit the sense according as the subject requires. Let us suppose that the custom of a particular country confines the entail or fiefs to the male line properly so called: if an act of enfeoffment in that country declares that the fief is given to a person for himself and his male descendants, the sense of these last words must be restricted to the males descending from males; for the subject will not admit of our understanding them also of males who are the issue of females, though they are reckoned among the male descendants of the first possessor."(*b*)

§ 450. Lieber, in substituting close for what Rutherford denominates literal interpretation, denies *in toto* the use of the term of literal interpretation, on the ground that literal interpretation ought of course to mean, that which takes the words in their literal sense, which is hardly ever possible, since all human language is made up of tropes, elisions, images, expressions relating to erroneous conceptions, &c. That literal interpretation would, moreover, signify, in most cases, a contradiction, since there can be little doubt as to the meaning of a sentence, if the words are to be taken in a literal signification, and thus make sense at all. Interpretation, therefore, would be superfluous; and, on the other hand, it would be difficult to say where the literal signification of a word ends, and the figurative begins. That if we are to understand by literal interpretation, a species

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(*a*) Vattel, sec. 280.

(*b*) Id. book 2, ch. 17, secs. 292–295, pp. 259, 260.

which, by way of adhering to the letter, substitutes a false sense for a true one, it has no more meaning than the term false facts. That it is false, deceptive, or artful interpretation, if we do not give that sense which they ought to have, according to good faith, common sense, and the use which the utterer made of them. That the terms literal, rational, and mixed, lose greatly their importance, or become actually inadmissible, if we adhere to his definition of interpretation, which is to find the true sense. That there can be no literal sense, and beside it another. A single word may signify indeed several things, and in order to determine in which sense it has been used in a particular passage, we should be obliged, as a matter of course, to use grammar, etymology, logic, and every other means which are in constant use among men, to understand the words of one another.

§ 451. Puffendorff says the true end and design of interpretation is to gather the intent of the man from the most probable signs. These signs are of two sorts, words and conjectures, which may be considered separately or both together. Domat says there are two sorts of cases where it is necessary to interpret laws. One is, when we find in a law some obscurity, ambiguity, or other defect of expression; for in this case it is necessary to interpret the law, in order to discover its true meaning. And this kind of interpretation is limited to the expression, that it may be known what the law says. The other is, when it happens that the sense of a law, how clear soever it may appear in the words, would lead us to false consequences, and to decisions that would be unjust, if the laws were indifferently applied to every thing that is contained within the expression. For in this case, the palpable injustice that would follow from this apparent sense, obliges us to discover by some kind of interpretation, not what the law says,

but what it means; and to judge by its meaning, how far it ought to be extended, and what are the bounds that ought to be set to its sense. And this kind of interpretation depends always on the temperament that some other rule gives to the law which we should be in danger of misapplying, if we did not explain it. For it is this temperament that gives to the law its use and its verity.(*a*)

§ 452. Almost every rule of interpretation and construction which has been engrafted into the common law, has been derived from the civilians: indeed, the civil law writers have laid the entire foundation of the common law in this particular. We shall, therefore, in this connection, proceed to consider consecutively the rule laid down by the civilians on this subject. Many of them will be again adverted to hereafter in connection with those of the common law. Before doing so, however, it is necessary that we should remark that many of those rules are laid down in reference to the interpretation of laws. The word "*laws*," as used by them in some instances, refers to all laws, including the law of nature, and laws which, with us, would more properly be denominated the common law—and arbitrary laws, that is, laws which, with us, would be denominated statute law. Thus Domat says, laws or rules are of two sorts; one is of those which flow from the law of nature and equity, and the other is of such as derive their origin from the positive law, which are otherwise called human and arbitrary laws, because they have been established by the laws of men.(*b*) The word arbitrary law, however, is also used by them in a more extended sense, and would also include what, with us, would be regard-

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(*a*) Domat's Civil Law, Prel. B. p. 7, tit. i. sec. 2, pl. 2.
(*b*) Ibid. p. 3, tit. i. sec. 1, pl. 2.

ed rather as parts of the common law, originating perhaps from ancient statutes, of which no record remains. Thus Domat says arbitrary laws are of two sorts. The one is of those that have been originally enacted, written, and promulged, by those that had the legislative authority; and such are, in France, the edicts and ordinances of the kings. The other is of such laws, of whose origin and first establishment there is nothing appears, but which are received by universal approbation, and by the constant use that the people has made of them time out of mind; and these are the laws, or rules, to which we give the name of customs.(*a*)(*b*) Keeping this distinction in view, we shall readily discover which of these rules have an application to statutes, and which not. The civil law doctrine of equitable construction, as will be seen in a subsequent chapter, has been adopted by us with much qualification, and is to be taken in a very restricted sense.

§ 453. Domat lays down the following rules: that for the right understanding of a rule, it is not enough to apprehend the apparent sense of the words, and to view it by itself; but it is necessary likewise to consider if there are not other rules that limit it. For it is certain, that every rule having its proper justice, which cannot be contrary to that of any other rule; each rule hath its own justice within its proper bounds. And it is only the connection of all the rules together that constitutes their justice, and limits their use. Or rather, it is natu-

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(*a*) Constat autem jus nostrum quo utimur, *aut scripto, aut sine scripto*, ut apud Græcos, *τῶν νόμων οἱ μὲν ἔγγραφοι, οἱ δὲ ἄγραφοι*, i. e. *legum sunt scriptæ aliæ, aliæ non scriptæ.* Scriptum autem jus est lex, plebiscitum, senatusconsultum. Principum placita, magistratuum edicta, responsa prudentum. Sec. 3, inst. de jur. nat. gent. et civ. Sine scripto jus venit, quod usus approbavit. Nam diuturni mores, consensu utentium, comprobati, legem imitantur. Sec. 9, eod.

(*b*) Domat's Civil Law, Prel. B. p. 4, tit. i. sec. 1, pl. 10.

ral equity, which, being the universal spirit of justice, makes all the rules, and assigns to every one its proper use. From whence we must infer, that it is the knowledge of this equity, and the general view of this spirit of the laws, that is the first foundation of the use, and particular interpretation of all rules. This principle of interpreting the laws by equity, does not only respect the laws of nature, but reaches likewise to the arbitrary laws, they being all of them founded upon the laws of nature, as has been observed in the eleventh chapter of the Treatise of Laws. But to this principle of equity we must add, in so far as concerns the interpretation of arbitrary laws, another principle which is peculiar to them, and that is, the intention of the lawgiver, which determines how far the arbitrary laws regulate the use and interpretation of this equity. For in this kind of laws, the temperament of equity is restrained to what is agreeable to the intention of the lawgiver, and is not extended to whatever might have appeared to be equitable, before the arbitrary law was enacted.(*a*)

§ 454. In order to make a right use of this fundamental principle for the interpretation of laws, which is equity, it is not enough to observe in each rule what the light of reason finds to be equitable in its expression, and in the extent which it seems to have; but we must join to this a general view of universal equity, that we may discern in the cases which are to be regulated, whether there are not other rules that demand a justice altogether different, to the end we may not pervert any rule from its true use, and that we may apply to the matters of fact, and to their circumstances, the rules that agree to them. And if they are natural laws, we are to reconcile them by the extent and limits of their truth; or

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(*a*) Domat's Civil Law, Prel. B. p. 8, tit. i. sec. 2.

if they are arbitrary laws, we are to fix their equity by the intention of the lawgiver.(*a*)

§ 455. All rules, whether natural or arbitrary, have their use, such as it is assigned to every one of them by universal justice, which is the spirit of them all. Thus, the application of the laws is to be made, by discerning what it is that this spirit demands; which in natural laws is equity; and in arbitrary laws is the intention of the lawgiver. And it is in this discerning faculty that the science of the law does chiefly consist.(*b*)(*c*)

§ 456. If it happens that a natural rule being applied to some case which it seems to include, there follows from such application a decision contrary to equity, we must from thence conclude that the rule is not rightly applied, and that it is by some other rule that this case ought to be judged.(*d*)

§ 457. If an arbitrary law being applied to a case which it seems to include, there follows a consequence contrary to the intention of the lawgiver, the rule ought not to be extended to that case.(*e*)

§ 458. We must not take for injustices contrary to equity, or to the intention of the lawgiver, those decisions which seem to have some hardship in them, which is called the rigor of the law, when it is evident that that rigor is essential to the law from which it flows, and that

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(*a*) Domat's Civil Law, Prel. B. p. 9, tit. i. sec. 2.

(*b*) In omnibus quidem maxime tamen in jure, æquitas spectanda, l. 90, ff. de reg. jur. In summa æquitatem ante oculos habere debet Judex. l. 4, sec. 1, ff. de eo quod certo loco. Benignius leges interpretandæ sunt, quo voluntas earum conservetur. L. 18, ff. de legib. mens legislatoris; l. 13, sec. 2, ff. de excus. tutor. Scire leges non hoc est verba earum, tenere, sed vim ac potestatem. L. 17, ff. de legib. Ratio naturalis quasi lex quædam tacita. L. 7, ff. de bon. damnat. Jus est ars boni et æqui. L. 1, ff. de just. et jur.

(*c*) Domat's Civil Law, Prel. B. p. 9, tit. i. sect. 2, pl. 1.

(*d*) Ibid. 10, pl. 2.

(*e*) Ibid. pl. 3.

no temperament can be applied to the law without annulling it.(*a*)

§ 459. If the hardship or rigor of a law be not a necessary consequence of the law, and inseparable from it, but that the law may have its effect by an interpretation which mitigates the said rigor, and by some temperament which equity, that is, the spirit of the law, requires; we must in this case prefer equity to the rigor which the letter of the law seems to demand, and follow rather the spirit and intendment of the law, than the strict and rigid way of interpreting it.(*b*)(*c*)

§ 460. It follows from the foregoing rules, that we cannot lay it down as a general rule, either that the rigor of the law ought to be always followed, contrary to the temperament of equity, or that it ought always to yield to equity. But this rigor becomes an injustice in the cases in which the law will admit of an equitable interpretation; and it is, on the contrary, a just rule in the cases where such an interpretation would destroy the law.(*d*) Thus, the word *rigor of the law* is taken either for a hardship that is unjust and odious, and no ways conformable to the spirit of the laws, or for a rule that is inflexible, but which has nevertheless its justice. And

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(*a*) Domat's Civil Law, Prel. B. p. 10, tit. i. sec. 2, pl. 4.

(*b*) Placuit in omnibus rebus præcipuam esse justitiæ æquitatisque, quam stricti juris, rationem. L. 8, C. de judic. Benignius legis interpretandæ sunt, quo voluntas earum conservetur. L. 18, ff. de legib. Etsi maxime verba legis hunc habent intellectum, tamen mens legislatoris aliud vult. L. 13, sec. 2, ff. de excus. tut. Hæc æquitas suggerit, etsi jure deficiamur. L. 2, sec. 5, in f. ff. de aqua et aquæ pluv. arc. Ubicumque judicem æquitas moverit. L. 21, ff. de interrog. Naturalem potius in se, quam civilem habet æquitatem. Siquidem civilis deficit actio, sed natura æquum est. L. 1, sec. 1, ff. si is qui test. lib. Benigniorem interpretationem sequi, non minus justius est, quam tutius. L. 192, sec. 1, ff. de reg. jur. Semper in dubiis benigniora præferenda sunt. L. 56, eod. Rapiendi occasio est, quæ præbet benignius responsum. L. 168, eod.

(*c*) Domat's Civil Law, Prel. B. p. 10, tit. i. sec. 2, pl. 5.

(*d*) This article is a consequence of the foregoing rules.

we must be careful never to confound the use of these two ideas; but we ought to make a right discernment, and to apply either the just severity, or the temperament of equity, according to the preceding rules and those which follow.(*a*)

§ 461. It is never free and indifferent for us to choose either the rigor of the law, or equity, so as to be at liberty in one and the same case to apply either the one or the other indifferently and without injustice. But in every fact, we must determine ourselves either to the one or to the other, according to the circumstances, and to what the spirit of the law requires. Thus, we must judge according to the rigor of the law, if the law admits of no mitigation; or according to the temperament of equity, if the law will bear it.(*b*)(*c*)

§ 462. The obscurities, ambiguities, and other defects of expression, which may render the sense of a law dubious, and all the other difficulties of understanding aright, and applying justly the laws, ought to be resolved by the sense that is most natural, that has the greatest relation to the subject, that is most conformable to the intention of the lawgiver, and most agreeable to equity. And this is discovered by the several views of the nature of the law, of its motive, of the relation it has to other laws, of the exceptions that may limit it, and by other reflections of this kind, which may discover the spirit and sense of the law.(*d*)(*e*)

(*a*) Domat's Civil Law, Prel. B. p. 11, tit i. sec. 2, pl. vi.

(*b*) This article is also a consequence of the preceding rules.

(*c*) Domat's Civil Law, Prel. B. p. 12, tit. i. sec. 2, pl. 7.

(*d*) In ambigua voce legis, ea potius accipienda est significatio quæ vitio caret. Præsertim cum etiam voluntas legis, ex hoc colligi possit. L. 19, ff. de legib. Quoties idem sermo duas sententias exprimit, ea potissimum excipiatur quæ rei gerendæ aptior est. L. 67, ff. de reg. jur. Prior atque potentior est quam vox, mens dicentis. L. 7, in ff. de suppell. leg. Benignius leges interpretandæ sunt, quo voluntas earum conservetur. L. 18, ff. de legib. Scire leges non hoc est verba earum tenere, sed vim ac potestatem. L. 17, eod.

(*e*) Domat's Civil Law, Prel. B. p. 12, tit. i. sec. 2, pl. 9.

§ 463. For understanding aright the sense of a law, we ought to consider well all the words of it, and its preamble, if there be any, that we may judge of the meaning of the law by its motives and by the whole tenor of what it prescribes; and not to limit its sense, to what may appear different from its intention, either in one part of the law taken separately, or by a defect in the expression. But we must prefer to this foreign sense of a defective expression, that which appears otherwise to be evident by the spirit of the whole law. Thus, it is to transgress against the rules and spirit of laws, to make use, either in giving of judgment, or counsel, of any one part of a law taken separately from the rest, and wrested to another sense than what it has when it is united to the whole.(*a*)(*b*)

§ 464. If there happens to be omitted in a law any thing that is essential to it, or that is a necessary consequence of its disposition, and that tends to give to the law its entire effect, according to its motive, we may in this case supply what is wanting in the expression, and extend the disposition of the law to what is included within its intention, although not expressed in the words.(*c*)(*d*)

(*a*) Incivile est nisi tota lege perspecta, una aliqua particula ejus proposita, judicare, vel respondere. L. 24, ff. de legib. Verbum ex legibus, sic accipiendum est, tam ex legum sententia, quam ex verbis. L. 6, sec. 1, ff. de verb. sign. Etsi maxime verba legis hunc habent intellectum, tamen mens legislatoris aliud vult. L. 13, sec. 2, ff. de excus. tut. See the preceding articles. See upon the word preamble the 134th Law, sec. 1, ff. de verb. obl.

(*b*) Domat's Civil Law, Prel. B. p. 12, tit. i. sec. 2, pl. 10.

(*c*) Quod legibus omissum est, non omittetur religione judicantium. L. 13, ff. de testib. Quoties lege aliquid unum vel alterum introductum est, bona occasio est, cætera quæ tendunt ad eamdem utilitatem, vel interpretatione, vel certe jurisdictione suppleri. L. 13. ff. de legib. Supplet prætor in eo quod legi deest. L. 11, ff. de præser. verb. Licet orationis sub divo Marco habitæ verba deficiant, is tamen qui post contractas nuptias nurui suæ curator da-

(*d*) Domat's Civil Law, Prel. B. p. 12, tit. i. sec. 2, pl. 11.

§ 465. If the words of a law express clearly the sense and intention of the law, we must hold to that. But if the true sense of the law cannot be sufficiently understood by the interpretations that may be made of it, according to the rules that have been just now explained, or that the sense of the law being clear, there arise from it inconveniences to the public good, we must in this case have recourse to the prince, to learn of him his intention as to what is liable to *interpretation*, *explanation*, or *mitigation*; whether it be for understanding the law or mitigating its severity.(*a*)(*b*)

§ 466. If the true meaning of a law being well known, although we are ignorant of its motive, there seems to

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tur, excusare se debet, ne manifestam sententiam ejus offendat. L. 17, C. de excus. tut. Edicti quidem verba cessabunt: Pomponius autem ait, sententiam edicti porrigendam esse ad hæc. L. 7, sec. 2, ff. de jurisd. See in this section the 21st, 22d and 23d articles, which serve as examples of this.

(*a*) Leges sacritissimæ quæ constringunt hominum vitas, intelligi ab omnibus debent, ut universi præscripto earum manifestius cognito, vel inhibita declinent, vel permissa sectentur. Si quid vero in iisdem legibus latum fortassis obscurius fuerit, oportet id ab imperatoria interpretatione patefieri, duritiamque legum, nostræ humanitati incongruam, emendari. L. 9, C. de leg. Inter æquitatem, jusque interpositam interpretationem, nobis solis et oportet et licet inspicere. L. 1, eod. Si enim in præsenti leges condere soli imperatori concessum est, et leges interpretari, solo dignum imperio esse oportet. L. ult. eod. Nov. 143. De his quæ primo constituuntur, aut interpretatione, aut constitutione optimi principis certius statuendum est. L. 11, ff. eod. Thus the Parliament made remonstrance to Charles the Seventh, touching the declarations, interpretations, modifications, which were to be made to the ancient ordinances, upon which followed that of 1446. Thus the ordinance of Moulins, art. 1, and that of 1667, tit. i. art. 3 and art. 7, enjoin the Parliaments and the other courts, to make their remonstrances to the king touching what appeared in the ordinances to be contrary to the advantage or convenience of the public; or to want interpretation, declaration, or mitigation. See the 33d article of the ordinance of Philip VI. in the year 1349, empowering the Council and the Chamber of Accounts to make the declarations and interpretations that should be wanted on the said ordinance. De interpretatione canonum ecclesiasticorum, siquid dubietatis emerserit. V. l. 6, de Sacrosanct. Eccl. de dubietate, quæ in canonibus emerserit. V. l. 6, C. de Sacrosanct. Eccl.

(*b*) Domat's Civil Law, Prel. B. p. 13, tit. i. sec. 2, pl. 12.

arise from it some inconvenience that cannot be avoided by a reasonable interpretation, we must presume that the law has nevertheless its usefulness and its equity founded upon some view of the public good, which ought to make us prefer the sense and authority of the law to the reasonings that may be brought against it. For otherwise many laws, very useful and well established, would be overthrown either by some other views of equity or by subtilty of reasoning.(*a*)(*b*)

§ 467. The laws which are in favor of that which the public good, humanity, religion, the liberty of making contracts and testaments, and other such like motives, render favorable, and those which are made in favor of any persons, are to be interpreted in as large an extent as the favor of these motives, joined with equity, is able to give them, and they ought not to be interpreted strictly, nor applied in such manner as to be turned to the prejudice of those persons in whose favor they were made.(*c*)(*d*)

(*a*) Non omnium quæ a majoribus constituta sunt ratio reddi potest. L 20, ff. de legib. et ideo rationes eorum quæ constituuntur, inquiri non oportet, alioquis multa ex his quæ certa sunt, subvertuntur. L. 21, eod. Disputare de principali judicio non oportet. ' L. 3, C. de crim. Sacril. Multa jure civili contra rationem disputandi, pro utilitate communi recepta esse, innumerabilibus rebus probari potest. L. 51, sec. 2, ff. ad l. Aquil.

(*b*) Domat's Civil Law, Prel. B. p. 13, tit. i. sec. 2, pl. 13.

(*a*) Nulla juris ratio, aut æquitatis benignitas patitur, ut quæ salubriter pro utilitate hominum introducuntur, ea nos duriore interpretatione, contra ipsorum commodum producamus ad severitatem. L. 25. ff. de legib. Aliam causam esse institutionis quæ benigne acciperetur. L. 19, ff. de lib. et post. propter publicam utilitatem —— strictam rationem insuper habemus, quæ nonnunquam in ambiguis religionum quæstionibus omitti solet. Nam summam esse rationem quæ pro religione facit. L. 43, ff. de relig. et sumpt. funerum. Quod favore quorumdam constitutum est, quibusdam casibus ad læsionem eorum nolumus inventum videri. L. 6, C. de legib. legem enim utilem reipublicæ —— adjuvandam interpretatione. L. 64, sec. 1, ff. de condit. et dem. See an example of the last part of this rule in the ninth article of the third section of the contract of sale; and another in the third law, sec. 5, ff. de carb. ed. The rest needs no example.

(*b*) Domat's Civil Law, Prel. B. p. 13, tit. i. sec. 2, pl. 14.

§ 468. The laws which restrain our natural liberty, such as those that forbid any thing that is not in itself unlawful, or which derogate in any other manner from the general law; the laws which inflict punishments for crimes and offences, or penalties in civil matters; those which prescribe certain formalities; the laws which appear to have any hardship in them; those which permit disinheriting and others the like, are to be interpreted in such a manner as not to be applied, beyond what is clearly expressed in the law, to any consequences to which the laws do not extend. And on the contrary, we ought to give to such laws all the temperament of equity and humanity that they are capable of.(*a*)(*b*)

§ 469. If any law or custom happens to be established upon particular considerations, contrary to other rules, or to the general law, it ought not to be drawn to any consequence beyond the cases which the words of the law mark expressly.(*c*)

(*a*) This is a consequence of the preceding rules. Interpretatione legum pœnæ moliendæ sunt, potius quam asperandæ. L. 42, ff. de pœn. In pœnalibus causis benignius interpretandum est. L. 155, sec. ult. ff. de reg. jur. In levioribus causis proniores ad lenitatem judices esse debent, in gravioribus pœnis, severitatem legum, cum aliquo temperamento benignitatis, subsequi. L. 11, ff. de pœn. Vid. l. 32, eod. Aliam causam esse institutionis quæ benigne acciperetur; exhæredationes autem non essent adjuvandæ. L. 19, ff. de lib. et post. Si ita libertatem acciperit ancilla, si primum marem peperit, libera esto: et hæc, uno utero marem et fœminam peperisset, siquidem certum est quid prius edidisset, non debet de ipsius statu ambigi, utrum libera esset, necne. Sed nec filiæ, nam si postea edita est, erit ingenua. Sin autem hoc incertum est, nec potest nec per subtilitatem judicialem manifestari, in ambiguis rebus humaniorem sententiam sequi oportet. Ut tam ipsa libertatem consequatur, quam filia ejus ingenuitatem. Quasi per præsumptionem priore masculo edito. L. 10, sec. i. ff. de reb. dub. Quod contra rationem juris receptum est, non est producendum ad consequentias. L. 14, ff. de legib. In quorum finibus emere quis prohibetur, pignus accipere non prohibetur. L. 24, ff. de pign. Although the example of this slave be quoted in this law 10, sec. 1, ff. de reb. dub. upon the subject of Testaments, yet it may be also applied here.

(*b*) Domat's Civil Law, Prel. B. p. 13, tit. i. sec. 2, pl. 15.

(*c*) Ibid. pl. 16.

§ 470. If the laws in which there is some doubt or other difficulty have any relation to other laws which may help to clear up their sense, we must prefer to all other interpretations that which they may have from the other laws. Thus, when new laws have reference to old ones, or to ancient customs, or ancient laws to modern ones, they are interpreted one by the other, according to their common intention, in so far as the latter laws have not abrogated the former.(*a*)(*b*)

§ 471. If the difficulties which may happen in the interpretation of a law or custom are explained by an ancient usage, which has fixed the sense of the law, and which is confirmed by a constant series of uniform decrees, we must stick to the sense declared by the constant practice, which is the best interpreter of laws.(*c*)(*d*)

§ 472. All laws extend to every thing that is essential to their intention. Thus, the laws allowing males to marry at the age of fourteen years complete, and females at the age of twelve, it is a consequence of these laws, that those who marry, can bind themselves, although minors, to the performance of the articles agreed on in marriage, which relate to the wife's portion, her jointure, the community of goods, and other matters of the like nature. Thus, judges being established to administer justice, their authority extends to every thing that is necessary for the exercise of their functions; such as the

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(*a*) Non est novum, ut priores leges ad posteriores trahantur. L. 26, ff. de legib. Sed et posteriores leges ad priores pertinent : nisi contrariæ sint. Idque multis argumentis probatur. L. 28, eod.

(*b*) Domat's Civil Law, Prel. B. p. 14, tit. i. sec. 2, pl. 18.

(*c*) Si de interpretatione legis quæratur, in primis inspiciendum est quo jure civitas retro in ejusmodi casibus usa suisset : optima enim est legum interpres consuetudo. L. 37, ff. de legibus. Nam imperator noster Severus rescripsit in ambiguitatibus, quæ ex legibus proficiscuntur, consuetudinem, aut rerum perpetuo similiter judicatarum authoritatem, vim legis obtinere debere. L. 38, eod.

(*d*) Domat's Civil Law, Prel. B. p. 14, tit. i. sec. 2, pl. 19.

right of inflicting penalties on those who contravene the orders of justice: and it is the same thing as to all the other consequences of their ministry.(*a*)(*b*)

§ 473. In the laws which *permit* any thing, we draw the consequence from the greater to the lesser. Thus, those who have a right to give away their goods for nothing, have much more a right to sell them. And in like manner, those who have a right to appoint executors by a testament, have with much greater reason a right to bequeath particular legacies.(*c*)(*d*)

§ 474. In the laws which *forbid* any thing, we draw the consequence from the lesser to the greater. Thus, prodigals, who are not allowed to have the management of their own estate, are with much greater reason rendered incapable of alienating it. Thus, those who are declared to be unworthy of some office, or some honor, are much more unworthy of a greater office, and of a more considerable honor.(*e*)(*f*)

(*a*) Hæc æquitas suggerit, etsi jure deficiamur. L. 2, sec. 5, in f. ff. de aqua, et aquæ pluviæ arcend. Edicti quidem verba cessabunt: Pomponius autem ait, sententiam edicti porrigendam esse ad hæc. L. 7, sec. 2, ff. de jurisd. Cui jurisdictio data est, ea quoque concessa esse videntur, sine quibus jurisdictio explicari non potuit. L. 2, eod. By the law of England minors can make no legal settlements on their marriages. Coke i. Inst. f. 34ᵃ, 38ᵃ. And therefore an act of parliament is requisite to empower them so to do, and to confirm and ratify the settlements that are so made. By which means the legislative power takes care of the interest of minors, that they be not wronged in any transaction of this sort before they attain to the years of discretion, when they may be able to judge for themselves, and stipulate such conditions as they think fit.

(*b*) Domat's Civil Law, vol. i. prel. book, p. 15, tit. 1. sec. 2, pl. 21.

(*c*) Non debet cui plus licet, quod minus est, non licere. L. 21, ff. de reg. jur. Cujus est donandi, eidem et venendi, et concedendi jus est. L. 163, ff. de reg. jur. Qui potest invitis alienare, multo magis et ignorantibus, et absentibus potest. L. 26, ff. de reg. jur. See the two following sections.

(*d*) Domat's Civil Law, vol. i. prel. book, tit. 1, sec. 2, p. 15, pl. 22.

(*e*) Qui indignus est inferiore ordine, indignior est superiore. L. 4, ff. de Senatorib. Est enim perquam ridiculum, cum qui minoribus pœnæ causa prohibitus sit, ad majores aspirare. L. 7, sec. ult. ff. de interd. et releg.; l. 5, ff. de serv. export.

(*f*) Domat's Civil Law, vol. i. prel. book, tit. 1. sec. 2, p. 15, pl. 23.

§ 475. This extension of laws from the lesser to the greater, and from the greater to the lesser, is limited to the things which are of the same kind with those that are mentioned in the law, or which are such that its motive ought to be extended to them, as in the examples of the foregoing articles.(*a*) But we must not draw the consequence either from the greater to the lesser, or from the lesser to the greater, when they are things of a different kind, or such as the spirit of the law is not applicable to.(*b*) Thus, the law which permits persons who have attained to the years of marriage, although minors, to bind themselves by contracts of marriage, and to engage their estates for the performance of the covenants that are consequences of the marriage, would be wrongfully applied to other sorts of contracts, although of less importance. Thus, the liberty which an adult person has in his minority, to devise his whole estate by will, would not be rightly extended to the liberty of making over any part of it by a deed or gift that should take effect in his lifetime. Thus, the power which belongs to a lord of a manor, who has a royalty, or ample jurisdiction for the administration of justice within his

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(*a*) In eo quod plus sit, semper inest et minus. L. 110, ff. de reg. jur. Cum quis possit alienare, poterit et consentire alienationi. L. 165, eod. Lex Julia, quæ de dotali prædio prospexit, ne id marito liceat obligare, aut alienare, plenius interpretanda est, ut etiam de sponso idem juris sit, quod de marito. L. 4, ff. de fundo dot.

(*b*) Thus, in the ancient Roman law, the license which fathers had to take away the lives of their children, did not extend to the license of depriving them of their liberty, and making them slaves. Libertati a majoribus tantum impensum est, ut partibus, quibus jus vitæ in liberas necisq; potestas olim erat permissa, libertatem eripere non liceret. L. ult. C. de patr. potest. Thus in the same Roman law, it was lawful for a man to give to his concubine, but not to his wife. V. l. 58, et tot. Tit. ff. de donat. inter vir. et uxor. Thus by the same law, a husband was allowed to sell the lands which he got with his wife in marriage, if she consented to it; but he could not mortgage them, not even with her consent. Lex Julia fundi dotalis Italici alienationem prohibebat fieri a marito non consentiente muliere: hypothecam autem nec si mulier consentiebat. L. un. sec. 15, C. de rei ux. act.

own lordship, by the special grant of the sovereign, would be wrongfully applied to such as have grants only of an inferior jurisdiction, and in causes of lesser moment. Thus, the power of a lord chief justice will not infer that of a constable or bailiff. Thus, the laws which brand persons with infamy, would not be rightly extended to the confiscation of goods, although honor is much more valuable than any goods.(*a*)

§ 476. Mackeldey, in his Compendium of Modern Civil Law, considers the doctrine of interpretation, in its application to legal transactions. He divides and explains this doctrine in the following manner: "The interpretation of legal transactions is of three kinds, viz. *authentica*, *usualis*, or *doctrinalis;* according as it proceeds from the parties themselves, or is founded on the ordinary use of language, or on the rules of juridical hermeneutics. 1. In the *interpretatio authentica*, a distinction is to be made between contracts and testaments. In construing testaments, the doubtful passage must be taken in the sense in which the testator wished it to be undrstood.(*b*) The same rule applies to all other acts and instruments which proceed from a single party. But where several parties concur in a transaction, its authentic interpretation presupposes an accordance between them all, and therefore a one-sided explanation given by one of them cannot prejudice the rights of the others. 2. The *interpretatio usualis* applies particularly to cases where in a legal transaction words and phrases are employed, which have a strictly determined sense in the ordinary speech of the place, and it does not appear that the parties em-

(*a*) Domat's Civil Law, vol. i. prel. book, tit. 1, sec. 2, p. 15, pl. 24.

(*b*) Quisque verborum suorum optimus est interpres. Fr. 96, D. 50, 17.—Fr. 21, sec. 1, D. 28. 1.—*Bucher*, Recht der Forderungen, 2d edit. Leipsic, 1830, sec. 37.

ployed them in a different meaning.(*a*) Whenever cases of this kind occur in practice, it is important to ascertain whether the doubt, which arises from the expressions used in the transaction, has not previously presented itself and been removed by judicial decision.(*b*) 3. In the *interpretatio doctrinalis* the following rules are to be observed: 1. Every obscure and doubtful passage is to be explained according to the intention of the parties; and this we must endeavor to ascertain from the words, the usage of language, and also from the respective circumstances and relations of the parties to the transaction.(*c*) 2. If their real intention cannot be discovered with certainty, the obscure passage must be explained in such a manner as will deviate the least from the nature of the transaction, and hence adversely to him who puts in a claim which deviates from the nature of the transaction, and who ought therefore to have been careful to employ a clearer mode of expression.(*d*) 3. If there be a doubt respecting the amount of the debt, the doubtful passage must be explained in such manner as is least unfavorable to the promiser.(*e*) 4. And lastly, if, from the words employed in the transaction, it is altogether uncertain and doubtful what the party or parties intended, the transaction is invalid;(*f*) yet it is a principle

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(*a*) Arg. fr. 37, 38, D. 1, 3.—Fr. 21, sec. 1, in fin. D. 28, 1. See also fr. 69, sec. 1, D. 32.—Fr. 9–12, D. 33, 6.

(*b*) E. g. fr. 13, pr. D. 28, 2.—Fr. 17, sec. 1, D. 30.—Fr. 10, sec. 1, D. 34, 5.

(*c*) Fr. 219, D. 50, 16.—Fr. 67, D. 50, 17.—E. g. fr. 3, sec. ult. D. 33, 10.—Fr. 33, D. 34, 2.—Fr. 22, D. 34, 1.—Fr. 14, D. 33, 1.—Fr. 75, D. 32.

(*d*) Interpretatio facienda est secundum naturam negotii: fr. 3, D. 12, 1. Fr. 11. secs. 1, 2, D. 19, 1.—Fr. 72, pr. D. 18, 1.—Interpretatio facienda est contra eum, qui clarius loqui potuisset ac debuisset. Fr. 172, pr. D. 50, 17.—Fr. 39, D. 2, 14.—Fr. 21, D. 18, 1.—Fr. 38, sec. 18, D. 45, 1.—Fr. 26, D. 34, 5.

(*e*) In dubio id quod minimum est sequimur. Fr. 9, 34, D. 50, 17. Fr. 52, D. 19, 2.—Fr. 1, sec. 4, D. 45, 1.

(*f*) Fr. 188, D. 50, 17.—Fr. 2, fr. 10, pr. fr. 21, 27, 28, D. 34, 5.

of law, that the interpretation of a transaction shall favor its validity as far as possible."(*a*)(*b*) These rules have a more direct application to deeds and testaments than to statutes; although they serve in some respects to elucidate the general doctrine of interpretation now under consideration.

§ 477. No civil law writer has laid down rules of interpretation with greater precision than Vattel. We shall now proceed to state such elementary rules as we deduce from this writer, so far as we consider them applicable to statutes. We shall not quote his precise language, but extract from it those rules which we apply to statutes. We give these elementary rules from a conviction that they will greatly assist the legal student in getting a clear understanding of the reason and foundation upon which the rules hereafter stated rest; and also from our firm conviction, that what Domat has said is true to a great extent, when applied to the present age. He has justly remarked: "There is great danger of misapplying the rules of law, if we have not ample knowledge of all the particular rules, and of the several views that are necessary for interpreting and applying them aright."(*c*) This remark is as pertinent to statutory interpretation as to that of any other kind of laws.

§ 478. The first general maxim of interpretation laid down by this writer is, that it is not allowable to interpret what has no need of interpretation.(*d*) When the words of an act are in clear and precise terms,—when its meaning is evident, and leads to no absurd conclusions, there can be no reason for refusing to admit the meaning

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(*a*) Fr. 12, D. ibid.—Fr. 80, D. 45, 1.
(*b*) Kauffman's Mackeldey, sec. 180, pp. 172, 3.
(*c*) Domat, prel. b. tit. 1, p. 17.
(*d*) Vattel, b. 2, ch. 17, sec. 263.

which the words naturally present; to go elsewhere in search of conjecture in order to restrict or extend the act, would be but an attempt to elude it. Such a method, if once admitted, would be exceedingly dangerous, for there would be no law, however definite and precise in its language, which might not by interpretation be rendered useless. However luminous each clause might be,—however clear and precise the terms of it, all this would be of no avail, if it be allowed to go in quest of extraneous arguments, to prove that it is not to be understood in the sense which it naturally presents. Puffendorff says, "If the words of the law express clearly the sense and intention, we must hold to that.(*a*)

§ 479. The next general maxim which may be applied to statutes is this: that if the framers of a statute use language that is wholly unintelligible, or which conveys no meaning, courts, by interpretation, cannot make it express what upon its face remains unexpressed, or which cannot, by any fair rule of interpretation, be made out of the language the law-maker has seen fit to employ. Such an instance as this will rarely if ever occur in any modern act of the legislature.

§ 480. The sole object of interpretation of a statute is, to discover the intention of the framers. That intention is, however, sometimes very obscurely expressed. Whenever we meet with an obscurity in a statute, we are to consider what probably were the ideas of those who drew the act, and to interpret it accordingly.(*b*) This is the general rule for all interpretation. It particularly serves to ascertain the meaning of particular expressions, whose signification is not sufficiently determinate. Pursuant to this rule, we should, in remedial statutes, take those expressions in their utmost latitude,

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(*a*) Law N. & N. pr. b. p. 13, sec. 12. (*b*) Vattel, b. 2, c. 17, sec. 270.

when it seems probable from the language, that the law maker had in view every thing which in that extensive sense the words are capable of designating; and on the other hand, courts should restrict their meaning if from the language used, it is evident that the legislature intended to confine the act strictly to what would be comprehended in their more limited signification. By the same rule, a clause is to be interpreted in the utmost latitude which the strict and appropriate meaning of the words will admit of, when, from the language used, and the context and purview of the act, it is apparent that the framers of the act had in view every thing which the words in their strict and appropriate meaning comprehend. But, it must be interpreted in a more limited sense when, from the same sources, it appears manifest, that the legislature did not mean to extend it to all cases and to every thing which might be included within the strict propriety of the terms used.

§ 481. The next general maxim is, that the words used are to be interpreted, and explained, conformable to general usage.(*a*) Puffendorff says: "As for the words, the rule is, unless there be reasonable objections against it, they are to be understood in their proper and most known signification, not so much according to grammar as to the general use of them.(*b*) Vattel lays down this rule. It is to be presumed that the legislature employed the words in their proper signification; that is, the signification which common usage has affixed to them. It is not to be presumed, that it did not intend to annex the same meaning to the words which common usage had annexed to them; hence, in no instance, ought courts to deviate from the common usage of the words, unless it should clearly appear, that they were intended to be

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(*a*) Vattel, b. 2, c. 17, sec. 271. (*b*) Puff. Law N. & N. b. 5, c. 12, sec. 3.

used in a different sense, or unless there be weighty reasons for it.

§ 482. Languages incessantly vary, and the signification and force of words change with time. The common usage of the words at the time of the enactment is the true criterion by which to determine their meaning. Hence, in order to correctly interpret ancient statutes, the court should endeavor to ascertain the sense of the words, according to their common usage among the people, at the era of their enactment. To ascertain their sense according to such common usage, resort may be had to what definition the then common law had annexed to given words, if any had been annexed; also to the sense in which they had been used in contemporaneous deeds, and by contemporaneous writers, and as the use of language is governed by arbitrary rules, etymological or grammatical investigations, were they pursued with a view to discover the true import of the words, would seldom, if ever, afford a sure key by which to unlock the mind of the lawgiver; they therefore are not regarded as at all decisive of the true interpretation, and are not to be strictly or universally followed.

§ 483. Technical terms, or terms peculiar to the arts and sciences, ought commonly to be interpreted according to the definition given them by the masters of the art, or persons versed in the knowledge of the art or science to which the term belongs. If, however, the technical or other terms relate to things that admit of different degrees, a strict adherence to their technical definition is not always required, and in that case, the terms may be construed in a sense the most agreeable to the context.(*a*) Puffendorff lays down the rule thus: "As for terms of art, which are above the reach of the

(*a*) Vattel, b. 2, c. 17, secs. 276, 277.

common people, the rule is, that they be taken according to the definition of the learned in such art."(*a*)

§ 484. Where the terms are ambiguous, such a meaning should always be affixed to the words used, as is most suitable to the subject matter or purview of the act. This rule is based upon the reason, that the office of true interpretation is, to discover the thoughts, or rather the intent of the law-maker. Hence, whenever the legislature use words which are ambiguous, or which are susceptible of many different significations, it is presumed they were intended to be used in agreement with the general subject matter.(*b*)

§ 485. If an expression which is susceptible of different meanings occurs more than once in the same statute, it may not have the same signification in every instance in which it may be used, as it may be governed by the subject matter in its immediate context, or *pro substrata materia*. Thus, for instance, the word "day" has two significations, to wit: the natural, and the civil day; the former being the period between the rising and setting of the sun; the latter, the term of twenty-four hours. Should that word occur in the same statute, in different places, the immediate context of the one having reference to a certain number of days of mental or physical labor, and the immediate context of the other having reference to the time in which an act should be done, that is, within a given number of days; in the former case, the context would limit the word "day" to the natural day, for the legislature could not have intended successive civil days' effort without intercession. But in the latter, the context would indicate, that the word day was intended to embrace a civil day.

§ 486. Every interpretation that leads to an absurdity

(*a*) Puffendorff, b. 5, c. 12, sec. 4. (*b*) Ib. b. 5, c. 12, sec. 5.

ought to be rejected; by this is meant, that no such construction should be put upon a statute as would lead to an absurd consequence. This rule is founded upon the presumption, that the legislature did not intend an absurdity, hence, as that intention is to be ascertained, this presumption leads the mind to the conclusion, that any construction, which would lead to such consequences, is not the true one. By an absurdity, in the sense in which we now use the term, we mean not only that which is physically impossible, but also what is morally so. We regard that to be morally impossible which is contrary to reason, or in other words, that which could not be attributed to a man in his right senses.(*a*)

§ 487. The rule we have laid down in the preceding section ought to be followed, when the statute does not, considered in itself, present either obscurity or ambiguity in the language. For the uncertainty of the sense to be given to a law does not proceed *solely* from the obscurity or other defect in the expressions used, but also from the limited nature of the human mind, which cannot foresee all cases and circumstances, nor take into view all the consequences of what may be enacted; and also from the impossibility of entering into that immensity of detail which would be necessary to meet every possible case which might arise. As laws must necessarily deal in generals, and cannot descend to particulars, and as interpretation is the application of them to particular cases, as the presumption is against an absurd intent, whenever the words, taken in their proper and ordinary sense, would lead to such a consequence, the court should so far deviate from their meaning, as to avoid such a consequence.

§ 488. It is not to be presumed, that the legislature

(*a*) Vattel, b. 2, c. 17, sec. 282.

intended, that the results of its deliberate act, should prove of no effect, or in other words, a nullity. Hence, another rule of construction is, that no statute should be so construed as to produce such an effect. Indeed this rule is properly a branch of the preceding, for, to destroy the entire force and effect of a statute, by construction, and render it nugatory, would be to produce an absurdity; that is, it would be antagonistical to the presumption that something was intended by the law. It would, in effect, be equivalent to saying that when something was intended nothing was in fact intended, as construction is but following out the intendment of the legislature. The true rule is, that if many different interpretations present themselves from the language in which the law is expressed, and any one of them will enable us to avoid such an effect, that should be preferred, which appears to be the most agreeable to the intention of the framers of the statute, for that would be most consonant to the true office of interpretation.

§ 489. It sometimes happens that a statute, in some part, is expressed in obscure or equivocal terms; in other parts the same terms are used in a more clear, unequivocal, and precise manner, and from which their true sense may be clearly discerned. In all such cases, we ought to interpret the obscure or equivocal terms in such manner as that they shall agree and coincide with those which are clear and unequivocal, and which are found in other parts of the same statute.

§ 490. In the framing of statutes, conciseness is frequently studied, and hence it is, that things intended by the framers of an act, are imperfectly expressed, or, there is a degree of obscurity in the language, and what the framers intended to, and supposed they had expressed in a preceding or subsequent part of the act is not expressed, and as the same words sometimes have quite a different

signification, according to their connection and relation to other words in the context. Hence it is that the rule obtains, that every part and the whole law is to be considered, and the sense gathered from the whole and each expression, not so much the signification which a particular word individually would admit of, as that which it ought to have from the context, spirit and purview of the law. It was a maxim of the Roman law: "*Incivile est, nisi tota lege perspecta una aliqua particula ejus proposita judiciari vel respondere.*" It is only in this way an interpretation can be made in such a manner as that all parts shall be made consonant with each other, so that what follows may agree with what precedes. This should always be done by interpretation, unless it evidently appears, that by subsequent clauses, the framers intended to make some alteration in preceding ones; so too, two different statutes, enacted at different times, may have such a relation to each other, and stand so intimately connected, as that the one may serve as a key to the true interpretation of the other, and upon this principle rests the doctrine of examining all statutes *in pari materiâ*.

§ 491. The reason of the statute—that is, the motives which led to the making of it, the object in contemplation at the time the act was passed, is another criterion by which to ascertain the true meaning of the act. Attention should be paid to the circumstances whenever there is question either of explaining an obscure, ambiguous, indeterminate passage in an act of the legislature, or of applying it to a particular case. When we once know the reason, which alone determined the will of the law makers, we ought to interpret and apply the words used in a manner suitable and consonant to that reason, and as will be best calculated to effectuate the intent. Great caution should always be observed in the application of this rule to particular given cases; that is,

we ought always to be certain that we do know, and have actually ascertained, the true and only reason which induced the act. It is never allowable to indulge in vague and uncertain conjectures, or in supposed reasons and views of the framers of an act, where there are none known with any degree of certainty. Vattel, in the application of this rule to deeds and treaties, holds:—If the piece in question is in itself obscure,—if, in order to discover its meaning, we have no other resource than the investigation of the author's views or the motives of the deed,—we may then have recourse to conjecture, and, in default of absolute certainty, adopt, as the true meaning, that which has the greatest degree of probability on its side. But it is a dangerous abuse to go without necessity in search of motives and uncertain views, in order to wrest, restrict, or extend the meaning of a deed which is of itself sufficiently clear, and carries no absurdity on the face of it. Such a procedure is a violation of that incontestable maxim—that it is not allowable to interpret what has no need of interpretation.(*a*) Much less are we allowed,—when the author of a piece has in the piece itself declared his reasons and motives,—to attribute to him some secret reason, which may authorize us in giving an interpretation repugnant to the natural meaning of the expressions. Even though he should have entertained the views which we attribute to him,—yet, if he has concealed them, and announced different ones, it is upon the latter alone that we must build our interpretation, and not upon those which the author has not expressed: we assume, as true, against him, what he has sufficiently declared.(*b*) We ought to be the more circumspect in this

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(*a*) Vattel, sec. 263.
(*b*) Ibid. 266.

kind of interpretation, as it frequently happens that several motives concur to determine the will of the party who speaks in a law or a promise. Perhaps the combined influence of all those motives was necessary in order to determine his will;—perhaps each one of them, taken individually, would have been sufficient to produce that effect. In the former case, if we are perfectly certain that it was only in consideration of several concurrent reasons and motives that the legislature or the contracting parties consented to the law or the contract, the interpretation and application ought to be made in a manner agreeable to all those concurrent reasons, and none of them must be overlooked. But in the latter case, when it is evident that each of the reasons which have concurred in determining the will, was sufficient to produce that effect, so that the author of the piece in question would, by each of the reasons separately considered, have been induced to form the same determination which he has formed upon all the reasons taken in the aggregate, his words must be so interpreted and applied as to make them accord with each of those reasons taken individually. Suppose a prince has promised certain advantages to all foreign Protestants and artisans who will come and settle in his states: if that prince is in no want of subjects, but of artisans only,—and if, on the other hand, it appears that he does not choose to have any other subjects than Protestants,—his promise must be so interpreted as to relate only to such foreigners as unite those two characters, of Protestants and artisans. But if it is evident that this prince wants to people his country, and that, although he would prefer Protestant subjects to others, he has in particular so great a want of artisans, that he would gladly receive them, of whatever religion they be,—his words should be taken in a disjunctive sense, so that it will be suffi-

cient to be either a Protestant or an artisan, in order to enjoy the promised advantages.

§ 492. To avoid tedious and complex circumlocution, Vattel makes use of the term "*sufficient reason* for an act of the will," to express whatever has produced that act,—whatever has determined the will on a particular occasion; whether the will has been determined by a single reason or by many concurrent reasons. That *sufficient reason*, then, will be sometimes found to consist in a combination of many different reasons, so that, where a single one of those reasons is wanting, the *sufficient reason* no longer exists: and in those cases where we say that many motives, many reasons, have concurred to determine the will, yet so as that each in particular would have been alone capable of producing the same effect,—there will then be many *sufficient reasons* for producing one single act of the will. Of this we see daily instances. A prince, for example, declares war for three or four injuries received, each of which would have been sufficient to have produced the declaration of war.(*a*)

§ 493. Puffendorff says: "But that which helps us most in the discovery of the true meaning of the law, is, the reason of it, or the cause which moved the legislator to enact it. This ought not to be confounded with the mind of the law; for that is nothing but the genuine meaning of it; for the finding out of which, we call in the reason of it to our assistance. And this is of the greatest force when it evidently appears that some one reason was the only motive that the parties went upon, which is no less frequent in laws than in facts. And here that common saying takes place, that *the reason ceasing, the law itself ceases*.(*b*) But if several reasons con-

(*a*) Vattel, B. ii. p. 256, ch. 17, sec. 287, 288, 289.

(*b*) But as to this as regard statutes, see *post*.

cur together, and only one ceases, the others do not immediately expire, or become less able to support the efficacy of the law. Nay, sometimes the general reason of the thing seems to draw one way, and the absolute will of the legislator another, and, in such a case, the will of the legislator must be deemed by the subjects a reason, which if it be but clearly signified, although not altogether so congruous to the law of prudence, yet suffices to create an obligation." He illustrates it thus: "Another instance of a case which may be decided from the reason of the law. The law is, that those who in a storm forsake the ship, shall lose all; and the ship and the lading shall be theirs that stay in it. But in a very dismal tempest all forsake the ship, except one sick man who is not able to get out and escape: the ship by chance comes safe to port; the sick man seizes it as his: the owner puts in his plea against him. Now the reason of the law was, that those who had exposed their lives to save the ship should have some encouragement; but this the sick man cannot pretend, who neither stayed in the ship upon that account, neither contributed any thing to the saving of it."(*a*)

§ 494. When the things which constitute the reason of a law are considered as not actually existing, but simply as possible,—or in other words, when the fear of an event, as the result of a given act, is the reason which induced the legislature to enact a law, no case can, by construction, be exempted from it other than such an one in which it can be proved to demonstration that the event is really impossible. Vattel illustrates this rule thus: "For instance, if a law were to prohibit walking the streets by night with a lighted torch or candle, it would be an unavailing plea for the transgressor of that

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(*a*) Puffendorff, b. 5, ch. 12, pp. 307, 8.

law to allege that no mischief had ensued, and that he carried his torch with such circumspection that no ill consequence was to be apprehended." The bare possibility of causing a conflagration by such an act, induced the law, and such possibility was sufficient to have rendered it his duty to have obeyed the law.

§ 495. The doctrine that penal statutes are to be construed strictly, (as well as all or nearly all the other rules of interpretation and construction,) has been borrowed from the civil law writers, and they afford us the most correct rule by which to determine the line of demarcation between a strict and a liberal interpretation. The distinction taken by them is, that between things which are odious and those which are favorable. To the former they apply the rule of a strict construction; to the latter that of a liberal one. Vattel says: "There is, doubtless, no language in which there do not occur expressions, words or entire phrases susceptible of a more or less extensive signification. Many a word is equally applicable to the genus or the species:—the word *fault* implies intentional *guilt* or simple *error*:—several species of animals have but one name in common to both sexes, as *partridge, lark, sparrow*, &c.—when we speak of *horses* merely with a view to the services they render to mankind, *mares* also are comprehended under that name. In technical language a word has sometimes a more and sometimes a less extended sense than in vulgar use: the word *death*, among civilians, signifies not only natural death, but also civil death; *verbum*, in the Latin grammar, signifies only that part of speech called the *verb*; but, in common use, it signifies any *word* in general. Frequently also the same phrase implies more things on one occasion and fewer on another, according to the nature of the subject or matter: thus, when we talk of *sending succors*, sometimes we understand a body of auxiliary troops maintained and paid by the party who

sends them—at other times a body whose expenses are to be entirely defrayed by the party who receives them. It is therefore necessary to establish rules for the interpretation of those indeterminate expressions, in order to ascertain the cases in which they are to be understood in the more extensive sense, and those in which they are to be restricted to their more limited meaning.

§ 496. But it is to this head that the famous distinction, between things of a *favorable* and those of an *odious* nature, particularly belongs. Some writers have rejected the distinction,(*a*)—doubtless for want of properly understanding it. In fact, the definitions that have been given of what is *favorable* and what is *odious*, are not fully satisfactory nor easily applied. After having maturely considered what the most judicious authors have written on the subject, Vattel conceives the whole of the question to be reducible to the following positions, which convey a just idea of that famous distinction. When the provisions of a law or a convention are plain, clear, determinate, and attended with no doubt or difficulty in the application, there is no room for any interpretation or comment.(*a*) The precise point of the will of the legislature or the contracting parties, is what we must adhere to. But if their expressions are indeterminate, vague, or susceptible of a more or less extensive sense,—if that precise point of their intention cannot, in the particular case in question, be discovered and fixed by the other rules of interpretation,—we must presume it according to the laws of reason and equity: and, for this purpose, it is necessary to pay attention to the nature of the things to which the question relates. There are certain things of which equity admits the extension rather than the restriction; that is to say, that, with respect to

(*a*) See Barbeyrac's remarks on Grotius and Puffendorff.
(*b*) Vattel, sec. 263.

those things, the precise point of the will not being discovered in the expressions of the law or the contract, it is safer and more consistent with equity to suppose and fix that point in the more extensive than in the more limited sense of the terms,—to give a latitude to the meaning of the expressions, than to restrict it. These are the things called *favorable*. *Odious* things, on the other hand, are those, of which the restriction tends more certainly to equity than the extension. Let us figure to ourselves the intention or the will of the legislature or the contracting parties, as a fixed point. At that point precisely should we stop, if it be clearly known; if uncertain, we should at least endeavor to approach it. In things favorable, it is better to pass beyond that point than not to reach it; in things odious, it is better not to reach it than to pass beyond it."(*a*)

§ 497. He then proceeds to a specification of things which are deemed odious, and hence to receive a strict construction. We shall now proceed to their enumeration. 1st. *Every thing that contains a penalty.* The reason for this is, "with respect to the law, it is universally agreed, that, in case of doubt, the judge ought to incline to the merciful side, and that it is indisputably better to suffer a guilty person to escape than to punish one who is innocent. 2d. Whatever tends to render a deed void or ineffectual, either in whole or in part, and whatever produces any change in things already agreed upon. This rule has a more direct application to deeds than to statutes, although it may well be applied to statute, which produce by a particular construction such an effect. 3d. Whatever tends to change the present state of things. He however concedes that there are certain things which are considered in a double aspect, either as

(*a*) Vattel, b. 2, p. 264, ch. 17, sec. 300.

favorable or as odious, depending upon the particular view in which they are to be considered. He admits that although penalties are generally odious, yet, that they may be viewed in a favorable light when they are particularly necessary for the safety of society. He says: "When there is question of interpreting things of this nature, we ought to consider whether what is favorable in them greatly exceeds what appears odious; whether the advantage that arises from their being extended to the utmost latitude of which the terms are susceptible, will materially outweigh the severe and odious circumstances attending them; and if that is the case, they are to be ranked in the class of favorable things. Thus an inconsiderable change in the state of things or in conventions is reckoned as nothing, when it procures the inestimable blessings of peace. In the same manner, penal laws may be interpreted in their most extensive meaning on critical occasions when such an instance of severity becomes necessary to the safety of the state. Cicero caused the accomplices of Cataline to be executed by virtue of a decree of the senate, the safety of the republic rendering it improper to wait till they should be condemned by the people. But where there is not so great a disproportion in the case, and where things are in other respects equal, favor inclines to that side of the question which presents nothing odious; that is to say, we ought to abstain from things of an odious nature, unless the attendant advantage so far exceed the odious part as in a manner to conceal it from view. If there be any appearance, however small, of an equilibrium between the odious and the favorable in one of those things of a mixed nature, it is ranked in the class of odious things, by a natural consequence drawn from the principle on which we have founded the distinction between things of a favorable and things of an odious na-

ture,(*a*) because, in case of doubt, we should in preference pursue that line of conduct by which we are least exposed to deviate from the principles of equity. 1. When the question relates to things favorable, we ought to give the terms the utmost latitude of which they are susceptible according to the common usage of the language; and if a term has more than one signification, the most extensive meaning is to be preferred: for equity ought to be the rule of conduct with all mankind wherever a perfect right is not exactly determined and known in its precise extent. When the legislature or the contracting parties have not expressed their will in terms that are precise and perfectly determinate, it is to be presumed that they intended what is most equitable. Now, when there is question of favorable things, the more extensive signification of the terms accords better with equity than their more confined signification. 2. In questions relating to favorable things, all terms of art are to be interpreted in the fullest latitude of which they are susceptible, not only in common usage, but also as technical terms, if the person speaking understands the art to which those terms belong, or conducts himself by the advice of men who understand that art. 3. But we ought not, from the single reason that a thing is favorable, to take the terms in an improper signification: this is not allowable except when necessary, in order to avoid absurdity, injustice, or the nullity of the instrument, as is practised on every subject:(*b*) for we ought to take the terms of a deed in their proper sense, conformably to custom, unless we have very strong reasons for deviating from it.(*c*) 4. Though a thing appears favorable when viewed in one particular light, yet where the proper meaning of the terms would, if taken in its utmost

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(*a*) Vattel, sec. 300. (*b*) Ibid. sec. 282, 283. (*c*) Ibid. sec. 271.

latitude, lead to absurdity or injustice, their signification must be restricted according to the rules given above.(*a*) For here, in this particular case, the thing becomes of a *mixed* nature, and even such as ought to be ranked in the class of odious things. 5. For the same reason, although neither absurdity nor injustice results from the proper meaning of the terms; if, nevertheless, manifest equity or a great common advantage requires their restriction, we ought to adhere to the most limited sense which the proper signification will admit, even in an affair that appears favorable in its own nature, because here also the thing is of a mixed kind, and ought, in this particular case, to be esteemed odious. As to the rest, it is to be carefully remembered that all these rules relate only to doubtful cases, since we are not allowed to go in quest of interpretations for what is already clear and determinate.(*b*)

§ 498. "Since odious things are those whose restriction tends more certainly to equity than their extension, and since we ought to pursue that line which is most conformable to equity, when the will of the legislature or of the contracting parties is not exactly determined and precisely known, we should, when there is question of odious things, interpret the terms in the most limited sense; we may even, to a certain degree, adopt a figurative meaning, in order to avert the oppressive consequences of the proper and literal sense, or any thing of an odious nature, which it would involve: for we are to favor equity, and to do away every thing odious, as far as that can be accomplished without going in direct opposition to the tenor of the instrument, or visibly wresting the text. Now neither the limited nor even the figurative sense offers any violence to the text. In point of penalties, in

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(*a*) Vattel, sec. 293, 294. (*b*) Ibid. sec. 263.

particular when they are really odious, we ought not only to restrict the terms of the law, or of the contract, to their most limited signification, and even adopt a figurative meaning, according as the case may require or authorize it, but also to admit of reasonable excuses; which is a kind of restrictive interpretation, tending to exempt the party from the penalty."(*a*)

§ 499. Grotius has given us three things from which to trace out the design, where words are obscure or ambiguous, viz. the subject matter, the effects and the circumstances. As to the first, that the words are to be understood according to the subject matter. Puffendorf gives us several illustrations of the rule: A man promises you to defend you in the possession of the goods he sold you; his promise is not supposed to extend to extra judicial violence. A truce made for thirty days must be understood natural days, consisting of twenty-four hours, and not of artificial days, or the space of the sun above the horizon. Again, the word "*arms*," denotes sometimes the weapons of war, and sometimes the warriors themselves, according as the subject matter of the discourse directs. For if it be an article that neither party shall use *arms*, against a third, it is plain soldiers or an army is meant by it; but if upon a surrendering of a garrison it be stipulated that they deliver up their arms, not the soldiers but the weapons are supposed by it. In regard to the second, he says, "the effect and the consequences do often point out the genuine meaning of the words; for where words, if they be taken literally, are like to bear none, or, at least, a very absurd signification, to avoid such an inconvenience, we must a little deviate from the received sense of them. He gives us the following as an instance where this rule should be applied. At Bologna, it was enacted, that whosoever drew blood in the

(*a*) Vattel, b. 2, pp. 266, 278, ch. 17, sec. 306.

street should be severely punished. Upon which law a barber was indicted for opening a vein in the street; and it had like to have gone hard with him, because it was added in the statute, that the words should be taken precisely without any interpretation. In regard to the third, he says:—It gives great light to the interpretation of obscure passages to compare them with others that have some affinity with them; as to consider what the same author says in another place, where he handles the same matter, or to compare them with what goes before and follows in the context. For in a doubtful point the author must be supposed to be consonant to himself, and therefore if in one place he expresses his mind clearly, we ought to presume that he is still of the same mind in another place, unless it expressly appears that he has changed it.(*a*)

§ 500. Having thus far confined our observations to ethical and civil law writers, and having reviewed the rules which have been adopted and applied by them, we come now to consider this subject under the common law. As we proceed, we shall discover that most of the rules we have considered have in some form or other, been adopted into our own system of jurisprudence.

§ 501. It will aid us, the better to understanding this subject, to allude to some extent in this connection, to the rules of interpretation which obtain in the construction of deeds and wills, annoting as we proceed the distinction to be observed in those rules, as applicable to deeds and testaments, when applied to the question of statutory construction. 1st. The law will judge of a deed, or other instrument consisting of divers parts or clauses, by looking at the whole, and will give to each

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(*a*) Puffendorf, b. 5, c. 12.

part its proper office, so as to ascertain and carry out the intention of the parties.(*a*) This general rule lies at the foundation of the doctrine, that a statute is its own best expositor, and in construing it, the whole act and all its parts are to be considered, as well as all other statutes, *in pari materia*, for the purpose of ascertaining and carrying into effect the intention of the legislature.

§ 502. The rule stated in the preceding section includes another, to wit: that the sense and meaning of the parties in any particular instrument, should be collected *ex antecedentibus et consequentibus;* that is to say, every part of it should be brought into action, in order to collect from the whole one uniform and consistent sense, if that may be done;(*b*) or, in other words, the construction must be made upon the entire instrument, and not merely upon disjointed parts of it;(*c*) the whole context must be considered, in endeavoring to collect the intention of the parties, although the immediate object of the inquiry be the meaning of an isolated clause.(*d*) This rule applies in all its force in the construction of statutes, when seeking for the intention of the legislature. The following instances may be given as an illustration of this rule: "Thus, in the case of a bond with a condition, the latter may be read, and taken into consideration, in order to correct and explain the obligatory part of the instrument.(*e*) On the same principle, the recital in a deed or agreement may be looked

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(*a*) 2 Inst. 317.

(*b*) Per Ld. Ellenborough in *Barton* v. *Fitzgerald*, 15 East R. 541. Shep. Touch. 87.

(*c*) 2 Black. Com. 379; *Lord North* v. *Bishop of Ely*, cited in 1 Bulstr. 101; *Meyrick* v. *Meyrick*, 2 Cr. & J. 230.

(*d*) *Coles* v. *Hulme*, 8 B. & C. 568; Hobart, 275; *Gale* v. *Reed*, 8 East R. 79; Chitty on Contracts, 3d edit. 84.

(*e*) *Coles* v. *Hulme*, 8 B. & C. 568, (E. C. L. R. vol. 15;) and cases cited, Id. 574, n. (*a*).

at, in order to ascertain the meaning of the parties, and is often highly important for that purpose;(*a*) and the general words of a subsequent distinct clause or stipulation may often be explained by the matter recited.(*b*) So, covenants are to be construed according to the obvious intention of the parties, as collected from the whole context of the instrument containing them, and according to the reasonable sense of the words; and, in conformity with this rule, a covenant in large and general terms has frequently been narrowed and restrained,(*c*) where there has appeared something to connect it with a restrictive covenant, or where there are words in the covenant itself amounting to a qualification;(*d*) and it has been observed, that covenants are to be construed as independent or restrictive of each other, according to the apparent intention of the parties, upon an attentive consideration of the whole deed: every particular case, therefore, must depend upon the precise words used in the instrument before the court, and the distinctions will be found to be very nice and difficult.(*e*)"(*f*)

§ 503. From the rule considered in the preceding sec-

(*a*) Shep. Touch. 76; *The Marquis of Cholmondely* v. *Lord Clinton*, 2 B. & Ald. 625; S. C. 4 Bligh, 1; where it was held, (Bayley, J., diss.) that it was not competent to go into the intention of the settlor, apparent from the recital of a conveyance to uses, in order to explain the words of a particular limitation; such words being of plain and well-known import.

(*b*) *Payler* v. *Homersham*, 4 M. & S. 423; recognized, *Simons* v. *Johnson*, 3 B. & Ad. 180, (E. C. L. R. vol. 23;) *Solly* v. *Forbes*, 2 B. & B. 38, (Id. 6;) *Charleton* v. *Spencer*, 3 Q. B. 693, (Id. 43;) *Sampson* v. *Easterby*, 9 B. & C. 505, (Id. 17,) affirmed in error, 1 Cr. & J. 105.

(*c*) Per Ld. Ellenborough, C. J., *Iggulden* v. *May*, 7 East, 241; Plowd. 329; *Cage* v. *Paxton*, 1 Leon. 116; *Broughton* v. *Conway*, Moor, 58; *Gale* v. *Reed*, 8 East, 89; *Sicklemore* v. *Thistleton*, 6 M. & S. 9; *Hesse* v. *Stevenson*, 3 B. & P. 365, (E. C. L. R. vol. 7.) See *Doe* v. *Godwin*, 4 M. & S. 265.

(*d*) Judgment in *Smith* v. *Compton*, 3 B. & Ad. 200, (E. C. L. R. vol. 30.)

(*e*) 1 Wms. Saund., 5th ed., 60, n. (i).

(*f*) Broom's Legal Maxims, pp. 249, 250.

tion has been deduced the rule, that "in construing a statute, the intention of the lawgiver, and the meaning of the law are to be ascertained by viewing the whole and every part of the act. If any section be intricate, obscure, or doubtful, the proper mode of discovering its true meaning is by comparing it with the other sections, and finding out the sense of one clause by the words or obvious intent of another.(*a*) This, as Sir E. Coke observes, is the most natural and genuine method of expounding a statute;(*b*) and it is a true principle, that *verba posteriora propter certitudinem addita ad priora quæ certitudine indigent sunt referenda*(*c*)—reference should be made to a subsequent section, in order to explain a previous clause of which the meaning is doubtful. 'It is, in my opinion,' observes Mr. Justice Coleridge, in a recent case,(*d*) 'so important for the court, in construing modern statutes, to act upon the principle of giving full effect to their language, and of declining to mould that language, in order to meet either an alleged inconvenience, or an alleged equity, upon doubtful evidence of intention, that nothing will induce me to withdraw a case from the operation of a section which is within its words, but clear and unambiguous evidence that so to do is to fulfil the general intent of the statute, and, also, that to adhere to the literal interpretation is to decide inconsistently with other and overruling provisions of the same statute. When the evidence amounts to this, the court may properly act upon it; for the object of all rules of construction being to ascertain the meaning of

(*a*) *Stowel* v. *Lord Zouch*, Plowd. 365; *Doe* v. *Bywater* v. *Brandling*, 7 B. & C. 643, (E. C. L. R. vol. 42.)

(*b*) Co. Litt. 381, a.

(*c*) Wing. Max., p. 167; 8 Rep. 236. See 4 Leon. R. 248.

(*d*) *Rex* v. *The Poor Law Commissioners*, (*St. Pancras*,) 6 A. & E. 7, (E. C. L. R. vol. 33.)

the language used, and it being unreasonable to impute to the legislature inconsistent intents upon the same general subject-matter, what it has clearly said in one part must be the best evidence of what it has intended to say in the other; and if the clear language be in accordance with the plain policy and purview of the whole statute, there is the strongest reason for believing that the interpretation of a particular part inconsistently with that is a wrong interpretation. The court must apply, in such a case, the same rules which it would use in construing the limitations of a deed; it must look to the whole context, and endeavor to give effect to all the provisions enlarging or restraining, if need be for that purpose, the literal interpretation of any particular part.' "(*a*)

§ 504. It is another rule in the interpretation of written instruments, that the words shall be taken the most strongly against the party employing them.(*b*) Statutes, however, are not in general within the reason of this rule, because they are not the words of *parties*, but of the legislature; nor does this rule apply to wills.(*c*) Where, however, a statute is passed for the benefit of a canal, railway, or other company, it has been observed, that this, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed and set forth in the act, and the rule of construction in all such cases is now fully established to be, that any ambiguity in the laws of the contract, would operate against the adventurers, and in favor of the public, the former being entitled to claim nothing which is not clearly given by the act.(*d*)

(*a*) Broom's Legal Maxims, pp. 253, 254.

(*b*) Co. Litt. 36, a.

(*c*) 2 Dwarris on Statutes, 688; Lord Bacon's Works, vol. iv. p. 30.

(*d*) Per Lord Tenterden, C. J., *Stourbridge Canal Co.* v. *Wheeley*, 2 B. & Ad. 793; *Priestley* v. *Foulds*, 2 Scott N. R. 228, per Coltman, J., ibid.

§ 505. Another rule in the interpretation of written instruments, is, that in the absence of ambiguity, no exposition shall be made which is opposed to the express words of the instrument, or, in other words, it is not allowed to interpret what has no need of interpretation ;(*a*) nor will the law make an exposition against the express words and intent of the parties.(*b*) The rule under consideration applies equally to the interpretation of an act of parliament, the general rule being that *a verbis legis non est recedendum.*(*c*) A court of law will not make any interpretation contrary to the express letter of a statute ; for nothing can so well explain the meaning of the makers of the act as their own direct words, since *index animi sermo*, and *maledicta expositio quæ corrumpit textum*,(*d*) it would be dangerous to give scope for making a construction in any case against the express words, where the meaning of the makers is not opposed to them, and when no inconvenience will follow from a literal interpretation.(*e*)(*f*)

§ 506. *Falsa demonstratio non nocet.*(*g*) *Mere false description does not make an instrument inoperative. Falsa demonstratio* may be defined to be an erroneous description of a person or thing in a written instru-

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226 ; *Gildart* v. *Gladstone*, 11 East, 685 ; *Barrett* v. *Stockton and Darlington Railway Co.*, 2 Scott N. R. 370 ; S. C. 3 Scott N. R. 803, per Maul, J. ; *Portsmouth Floating Bridge Co.* v. *Nance*, 6 ib. 831 ; *Blakemore* v. *Glamorganshire Canal Co.*, 1 My. & K. 165 ; *Thicknesse* v. *Lancaster Canal Co.*, 4 M. & W. 482.

(*a*) Chitty on Contracts, 3 ed. 99 ; per Kelynge, C. J., *Lanyon* v. *Carne*, 2 Saund. R. 167.

(*b*) Co. Litt. 147, a, 7 Rep. 103.

(*c*) 5 Rep. 119; cited, Wing. Max. p. 25.

(*d*) 4 Rep. 35 ; 2 Rep. 24 ; 11 Rep. 34 ; Wing. Max. p. 26.

(*e*) Eldrich's case, 5 Rep. 119 ; cited, Argument, *Gaunt* v. *Taylor*, 3 Scott, N. R. 709.

(*f*) Broom's Legal Maxims, p. 268.

(*g*) 6 T. R. 676.

ment ;(*a*) and the above rule respecting it may be thus stated and qualified : as soon as there is an adequate and sufficient definition, with convenient certainty, of what is intended to pass by the particular instrument, any subsequent erroneous addition will not vitiate it.(*b*) "I have always understood," observes Lord Kenyon, speaking with reference to a will,(*c*) "that such *falsa demonstratio* should be superadded to that which was sufficiently certain before, there must *constat de persona ;* and if to that an inapt description be added, though false, it will not avoid the devise ;" and this observation is applicable not only to wills but to other instruments ;(*d*) so that the characteristic of cases strictly within the rule is this, that the description, so far as it is false, applies to no subject, and, so far as it is true, it applies to one subject only ; and the court, in these cases, rejects no words but those which are shown to have no application to any subject.(*e*) The rule, therefore, may be thus stated : *Præsentia corporis tollit errorem nominis, et veritas nominis tollit errorem demonstrationis.*(*f*)(*g*) This rule, in the case of *The Watervliet Turnpike Co.* v. *M'Kean*,(*h*) was held to apply to statutes as well as deeds and wills. In the case last cited, where a statute referred to another by

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(*a*) See Bell, Dict. and Dig. of Scotch Law, 420.

(*b*) Per Park, B. *Llewellyn* v. *Earl of Jersey*, 11 M. & W. 189 ; Com. Dig. "Fait," (E. 4.)

(*c*) *Thomas* v. *Thomas*, 6 T. R. 676. See also *Mosley* v. *Massey*, 8 East, 149 ; per Parke, J., *Doe d. Smith* v. *Galloway*, 5 B. & Ad. 51, (E. C. L. R. vol. 27 ; per Littledale, J., *Doe d. Ashforth* v. *Bower*, 3 B. & Ad. 459, (Id. 23 ;) *Gynes* v. *Kemsley*, 1 Freem. 293 ; Hobart, 32, 171 ; *Greene* v. *Armsteed*, Id. 65 ; Vin. Abr. "Devise," (T. b.) pl. 4.

(*d*) *London Grand Junction Railway Company* v. *Freeman*, 2 Scott, N. R. 705, 748.

(*e*) Wigram, Ex. Ev. 2d ed. 81.

(*f*) Bac. Max. reg. 24 ; 6 Rep. 66 ; 1 Ld. Raym. 303 ; 6 T. R. 675 ; *Doe* v. *Huthwaite*, 3 B. & Ald. 640, (Id. 5.)

(*g*) Broom's Legal Maxims, p. 269.

(*h*) 6 Hill, 616.

several descriptive particulars, some of which were manifestly false and others true, it was held the former might be rejected as surplusage, provided the remainder was suffered to show clearly what was meant. That a statute was not to be nullified, because some of its provisions were absurd, repugnant or untrue. It should be so construed as to make it effective rather than to destroy it.(*a*) If enough remained, after rejecting the parts which were inappropriate, to show what was intended by the legislature, that would suffice. In *The Chancellor of Oxford's case*,(*b*) it was resolved, that in an act of parliament, the misnomer of a corporation, when the express restriction appeared, should not avoid the act no more than a will for *parliament testament, et arbitramentum*, were to be taken according to the minds and intentions of those who are parties to them. And therefore, when the description of a corporation in an act of parliament, or in a will, is such that the true corporation intended was apparent, and it was impossible to be intended of any other incorporation, although the right name was not expressly followed, yet the act of parliament should take effect. The same principle has been adopted in Massachusetts in a case where a statute referred to a vote of a town, by a wrong date, it was held that the date might be rejected as surplusage, the reference being clear without it; and on this principle effect was given to the statute.(*c*) In this connection, it should be observed, that in construing deeds, it is a rule that *non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram*;(*d*) if it be doubtful

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(*a*) *Bulton* v, *Ward*, 2 Rolle's Rep. 127; *Moore* v. *Hussey*, Hob. Rep. 93, 97.

(*b*) 10 Rep. 57.

(*c*) *Shrewsbury* v. *Boylston*, 1 Pick. 105.

(*d*) Bac. Max. reg. 13.

upon the words whether they impart a false reference or description, or whether they be words of restraint, limiting the generality of the former name, the law will not intend error or falsehood. This rule has been illustrated thus: "I have some lands wherein all the demonstrations are true, and some wherein part of them are true and part false; then the will shall be interpreted as words of true limitation, to pass only those lands wherein all those circumstances are true;(*a*) and if a man pass lands, describing them by particular references, all of which are true, the court cannot reject any one of them."(*b*)

§ 507. The next general maxim in the interpretation of deeds is, that general words shall be aptly restrained, according to the subject-matter or person to which they refer. In construing the words, it is proper to consider, first, what is their meaning in the largest sense which, according to the common usage of language, belongs to them;(*c*) and if it should appear that that sense is larger than the sense in which they must be understood in the deed or act in question; then, secondly, what is the object for which they are used. They ought not to be extended beyond their ordinary sense, in order to comprehend a case within their object, for that would be to give effect to an intention not expressed; nor can they be so restricted as to exclude a case both within their object and within their ordinary sense, without violating a fundamental rule which requires that effect should be given to such intention of the parties as they have used fit words to express.(*d*)

§ 508. The express mention of one thing implies the

(*a*) *Doe d. Ashforth* v. *Bowen*, 3 B. & Ad. 459, 460; *Doe d. Chichester* v. *Oxenden*, 3 Taunt. 147.

(*b*) Per Le Blanc, J. *Doe* v. *Lyford*, 4 M. & S. 557.

(*c*) 3 Inst. 76.

(*d*) Per Maule, J. *Borradaile* v. *Hunter*, 5 Scott, N. R. 431, 432; *Moseley* v. *Molteux*, 10 M. & W. 533; Broom's Legal Max. 276.

exclusion of another; or, in other words, "*expressum facit cessare tacitum.*"(*a*) This maxim has only reference to inferences of fact, to be drawn from written instruments or parol declarations: it only means, that if you expressly name some, out of certain requisites, the inference is stronger, that those omitted are intended to be excluded, than if none at all had been mentioned.(*b*) This maxim, as applied to the construction of statutes, is thus expressed by Mr. Dwarris: "Sometimes the makers of a statute put the strongest cases, and, by construction, the lesser shall be included: here the cases are put by way of example, and not as excluding other things of a similar nature. Where, moreover, the words are general, and a statute is only declaratory of the common law, it shall extend to others besides the persons or things named. Sometimes, on the contrary, the expressions used are restrictive, and intended to exclude all things which are enumerated. Thus, where certain specific things are taxed, or subjected to any charge, it seems probable that it was intended to exclude every thing else even of a similar nature, and, '*a fortiori*,' all things different in genus and description from those which are enumerated. So, too, where a general act confers immunities which expressly exempts certain persons from the effect and operation of its provisions, it excludes all exemptions to which the subject might have been before entitled at common law; for the introduction of the exemption is necessarily exclusive of all other independent extrinsic exceptions."(*c*)

§ 509. *Ad proximum antecedens fiat relatio nisi impe-*

(*a*) Co. Litt. 210, a, 183, b. (*b*) Broom's Legal Max. 278.

(*c*) *Gregory* v. *Des Agnes*, 3 B. N. C. 85, 87; *Atkinson* v. *Fell*, 5 M. & S. 240; *Cates* v. *Knight*, 3 T. R. 442, 444; *Rex North* v. *Nibley*, 5 T. R. 21; see argument *Rex* v. *Woodland*, 2 East, 166, and in *Rex* v. *Bell*, 7 T. R. 600; *Rex* v. *Cunningham*, 5 East, 478; 2 Dwarris Stat. 712, 713.

diatur sententia.(*a*) Relative words refer to the next antecedent, unless, by such a construction, the meaning of the sentence would be impaired. Relative words generally are referred to the next antecedent, where the intent upon the whole deed does not appear to the contrary;(*b*) but, although this general proposition is true in strict grammatical construction, yet there are numerous examples in the best writers to show that the context may often require a deviation from this rule, and that the relative may be connected with nouns which go before the last antecedent, and either to take from it or give to it some qualification.(*c*) For instance, an order of magistrates was directed to the parish of W., in the county of R., and also to the parish of M., in the county of L., and the words "county of R." were then written in the margin, and the magistrates were, in a subsequent part of the order, described as justices of the peace for the county aforesaid: it was held, that it thereby sufficiently appeared that they were justices for the county of R.(*d*)(*e*) *Noscitur a sociis.*(*f*) The meaning of a word may be known by reference to the neighboring words.(*g*) It is a rule laid down by Lord Bacon, that *copulatio ver-*

(*a*) Noy's Max. 9th ed. p. 4.

(*b*) Com. Dig. "Parols," (A. 14, 15); Jenk. Cent. 180; Dyer, 46, b; Wing. Max. p. 19.

(*c*) Judgment, *Staniland* v. *Hopkins*, 9 M. & M. 192; in which case a difficulty arose as to the proper mode of construing a statute.

(*d*) *Rex* v. *St. Mary's, Leicester*, 1 B. & Ald. 327; and the remarks, per Curiam, on *Rex* v. *Moor Critchell*, 2 East, 66; *Baring* v. *Christie*, 5 East, 398; *Rex* v. *Chilverscoton*, 8 T. R. 178.

(*e*) Broom's Legal Maxims, p. 292.

(*f*) 3 T. R. 87.

(*g*) This, it has been observed, in reference to *King* v. *Melling*, 1 Vent. 225, was a rule adopted by Lord Hale, and was no pedantic or inconsiderate expression when falling from him, but was intended to convey, in short terms, the grounds upon which he formed his judgments. See 3 T. R. 87; 1 B. & C. 644, id. 8; Argument, 13 East, 531.

borum indicat acceptationem in eodem sensu(*a*)—the coupling of words together shows that they are to be understood in the same sense. So, where the meaning of any particular word is doubtful or obscure, or where the particular expression when taken singly is inoperative, the intention of the party who has made use of it may frequently be ascertained and carried into effect by looking at the adjoining words, or at expressions occurring in other parts of the same instrument; for *quæ non valeant singula juncta juvant*(*b*)—words which are ineffective when taking singly operate when taken conjointly; one provision of a deed, or other instrument, must be construed by the bearing it will have upon another.(*c*) The above rules are in truth comprised in that principle which universally obtains, that courts of law and equity will, in construing a written instrument, endeavor to discover and give effect to the intent of the party. They are, moreover, applicable, like other rules of grammar, whenever a construction has to be put upon a will, statute, or agreement; and although difficulty very frequently arises in applying them, yet this results from the particular words used, and from the particular facts existing in each individual case, so that one decision, as to the inference of a person's meaning and intention, can be considered as an express authority to guide a subsequent decision only where the words and circumstances are similar.(*d*) The application of the principle *noscitur a sociis* is very general in commercial instruments, such as policies of insurance, &c.(*e*) Mr. Justice Story,

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(*a*) Bac. Works, vol. 4, p. 26. (*b*) 2 Bulstr. 132.

(*c*) Argument, *Galley* v. *Barrington*, 2 Bing. 391, id. 9; per Ld. Kenyon, C. J. 4 T. R. 227.

(*d*) Broom's Legal Maxims, p. 295.

(*e*) *Cullen* v. *Butler*, 5 M. & S. 465; *Philips* v. *Barber*, 5 B. & Ald. 161; *De Vaux* v. *J'Anson*, 5 B. & C. 519; *Borradaile* v. *Hunter*, 5 Scott, N. R. 446; *Roe* v. *Read*, 8 T. R. 118; 1 Jarman on Wills, 645.

in one case, held that *noscitur a sociis* was a well founded maxim applicable to revenue as well as penal laws.(*a*)

§ 510. *Quæ hæret in litera hæret in cortice.*(*b*) He who considers merely the letter of an instrument goes but skin-deep into its meaning. The law respects the effect and substance of the matter, and not every nicety of form or circumstance.(*c*) The reason, therefore, and spirit of cases make law, and not the letter of particular precedents.(*d*) Hence, it is a rule connected with the interpretation of deeds and written instruments in general, that, where the intention is clear, too minute a stress should not be laid on the strict and precise signification of words.(*e*) For instance, by the grant of a remainder, a reversion will pass, and *e converso*;(*f*) and, if a lessee covenants to leave all the timber which was growing on the land when he took it, the covenant will be broken, if, at the end of the term, he cuts it down, but leaves it there; for this would be defeating the intent of the covenant, although a literal performance of it.(*g*) In accordance with this principle, it is a further rule, that *mala grammatica non vitiat chartam*(*h*)—the grammatical construction is not always, in judgment of law, to be followed; and neither false English nor bad Latin will make void a deed, when the meaning of the party is apparent.(*i*) Thus, the word "and" has, (as hereafter stated,) in some cases, been read

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(*a*) *Adams* v. *Bancroft*, 3 Sumner R. 386.

(*b*) Co. Litt. 283, b.

(*c*) Ibid. a; Wing. Max. p. 19. See per Coltman, J. 2 Scott, N. R. 300.

(*d*) Per Lord Mansfield, C. J. 3 Burr. 1364.

(*e*) 2 Bla. Com. 379.

(*f*) Hobart, 27; 2 Bla. Com. 379.

(*g*) Woodf. L. and T. 5th ed. 439, citing 1 Esp. N. P. 271.

(*h*) 9 Rep. 48; 6 Rep. 40; Wing. Max. p. 18; Vin. Abr. "Grammar," (A.); Lofft, 441.

(*i*) 2 Bla. Com. 379; Co. Litt. 223, b; *Osborn's case*, 10 Rep. 133; 2 Show. 334.

"or," when this change was rendered necessary by the context.(*a*) Where, however, a proviso in a lease was altogether ungrammatical and insensible, the court did not consider themselves bound to find out a meaning for it.(*b*) In interpreting an act of parliament, also, it is not, in general, a true line of construction to decide according to the strict letter of the act; but the courts will rather consider what is its fair meaning,(*c*) and will expound it differently from the letter, in order to preserve the intent.(*d*)(*e*)

§ 511. The construction of a statute, like the operation of a devise, depends upon the apparent intention of the makers, and is to be collected either from the particular provisions or the general context. The rules by which the sages of the law, according to Plowden,(*f*) have ever been guided, in seeking for the intention of the legislature, are maxims of sound interpretation, which have been accumulated by the experience, and ratified by the approbation of ages.

§ 512. "*Contemporanea expositio est optima et fortissima in lege.*(*g*)—The best and surest mode of expounding an instrument is by referring to the time when, and circumstances under which, it was made.—There is no better way of construing ancient grants and deeds than by usage;(*h*) and the uniform course of modern authori-

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(*a*) *Chapman* v. *Dalton*, Plowd. 289; 1 Jarman on Wills, 443 *et seq.*

(*b*) *Doe d. Wyndham* v. *Carew*, 2 Q. B. 317, (E. C. L. R. vol. 42.)

(*c*) Per Lord Kenyon, C. J. 7 T. R. 196, (E. C. L. R. vol. 46; id. 43;) *Fowler* v. *Padget*, id. 509; 11 Rep. 73; Litt. s. 67, with Sir E. Coke's Commentary thereon, cited, 3 B. N. C. 525, (E. C. L. R. vol. 42;) Co. Litt. 381, b. See *Vincent* v. *Slaymaker*, 12 East, 372.

(*d*) 3 Rep. 27.

(*e*) Broom's Legal Maxims, p. 299.

(*f*) Plow. Rep. 205.

(*g*) 2 Inst. 11.

(*h*) Per Lord Hardwicke, C., *Attorney General* v. *Parker*, 3 Atk. 576, and

ties fully establishes the rule, that, however general the words of an ancient grant may be, it is to be construed by evidence of the manner in which the thing granted has always been possessed and used; for so the parties thereto must be supposed to have intended.(*a*) Thus, if it be doubtful, on the face of an instrument, whether a present demise or future letting was meant, the intention of the parties may be elucidated by the conduct they have pursued.(*b*) If the words of the instrument be ambiguous, the court will call in aid the acts done under it as a clue to the intention of the parties.(*c*) Upon the same principle, also, depends the great authority which, in construing a statute, is attributed to the construction put upon it by judges who lived at the time when the statute was made, or soon after, as being best able to determine the intention of the legislature, not only by the ordinary rules of construction, but especially from knowing the circumstances to which it had relation;(*d*) and it has been resolved, that, for the true and sure interpretation of all statutes, be they penal or beneficial, restrictive of or enlarging the common law, four points are to be considered: 1st, what was the common law before the making of the act; 2ndly, what was the mischief and defect for which the common law did not provide; 3rdly, what remedy the parliament hath resolved and appointed to cure the disease of the commonwealth; and, 4thly, the true reason of the remedy;—and then the office of

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2 Inst. 282, cited, 4 T. R. 819. Per Lord Eldon, C., *Attorney General* v. *Forster*, 10 Ves. jun. 338.

(*a*) *Weld* v. *Hornby*, 7 East, 199; *Rex* v. *Osbourne*, 4 East, 327.

(*b*) *Chapman* v. *Bluck*, 4 B. N. C. 187, 195, (E. C. L. R. vol. 33.)

(*c*) Per Tindal, C. J., *Doe d. Pearson* v. *Ries*, 8 Bing. 181, (E. C. L. R. vol. 21.)

(*d*) 2 Phill. Ev., 9th ed., 347; *The Bank of England* v. *Anderson*, 3 B. N. C. 666, (E. C. L. R. vol. 32.)

the judges is always to make such construction as shall suppress the mischief, and advance the remedy.(*a*)"(*b*)

§ 513. The words of a statute are to be taken in their ordinary and familiar signification and import, and regard is to be had to their general and proper use, for the *jus et norma loquendi* is governed by usage, and the meaning of the words spoken or written ought to be allowed to be as it has constantly been taken to be, *loquendum est et vulgus*.(*c*) But, if the usage has been to construe the words of a statute contrary to their obvious meaning by the vulgar tongue, and the common acceptation of the terms, such usage is not to be regarded, it being (say the books,) rather an oppression of those concerned, than a construction of a statute.(*d*) And though where the words of a statute are doubtful, general usage may be called in to explain them, for *optimus legum est consuetudo*,(*e*) yet a usage that can cancel an act of parliament, must be universal, and not the usage of any particular place.(*f*)

§ 514. In the interpretation of statutes, it is but seldem, if ever, that we have to interpret any thing but words; hence the term interpretation means always the interpretation of the words. In regard to statutes, as well as all other instruments in writing, construction must inevitably be resorted to, for such is the imperfection of human language, that men who use words, even with the best intent, and utmost caution and skill, cannot foresee all possible complex cases, and if they could, no human forethought or intellectual sagacity, would be able to provide for them; for as it has been justly said, each complex case would require its own provision and

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(*a*) *Heydon's case*, 3 Rep. 7.
(*b*) Broom's Legal Maxims, 300.
(*c*) 4 Rep. 47.
(*d*) Vaughan, 169; Parker, 44.
(*e*) 2 Rep. 81.
(*f*) *Rex* v. *Hogg*, 1 T. R. 728.

rule; times and relations change, so that after a long lapse of time, we must either give up the letter of the law or its intent; since both, owing to a change in circumstances, do not any longer agree. Statute law, being the express written will of the legislature, rendered authentic, every statute in some respects partakes of the character of a deed; hence, in their construction, such an exposition should be made as is most agreeable to the intention of the law makers.

§ 515. The great object of the rules and maxims of the interpretation of statutes is, in all cases, if possible, to discover the true intention of the law; for this purpose, it is to ascertain what was the mind of the framers of a particular statute, and when that can be indubitably ascertained, the duty of the court is to give it effect, whatever may be their own opinion of its wisdom, expediency or policy. As it is the duty of courts to execute all laws according to their true intent and meaning, that intent, when collected from the whole and every part of the statute taken together, must prevail, even over the literal sense of the terms, and control the strict letter of the law, where the letter would lead to possible injustice, contradiction, and absurdity.(*a*)

§ 516. In *The Commonwealth* v. *Kimball*,(*b*) Shaw, Ch. J., says, "It is unquestionably a well settled rule of construction, applicable as well to penal statutes as to others, that when the words are not precise and clear, such construction will be adopted as shall appear the most reasonable, and best suited to accomplish the object of the statute; and where any particular construction would lead to an absurd consequence, it will be presumed, that some exception was intended by the legislature, to avoid such conclusion."

(*a*) 1 Kent's Com. 462; Dig. 1, 3, 7; Ibid. lib. 27, 1, 13, 2.
(*b*) 24 Pick. 370.

§ 517. It was a rule of the civil law, as we have seen, that whenever it happened that the sense of the law, how clear soever it may appear in the words, would lead to false consequences, and to decisions that would be unjust, if the law were to be indifferently applied to every thing contained within its expressions, this palpable injustice which would follow from its literal sense compelled an effort to discover some kind of interpretation, not what the law says, but what it means, and to judge by its meaning how far it ought to be extended, and what the bounds which ought to be set to its sense.(*a*)

§ 518. The reason for the above rule seems to be, that when a particular construction of a statute, applied to a case which it seems by its terms to include, there follow from such a construction an absurd consequence, respect for the legislature will induce the court from thence to conclude that some other construction, which will not produce such a consequence, ought to be adopted.(*b*) Hence every construction which leads to an absurdity, ought to be rejected. But the construction should be such as will avoid an absurdity.

§ 519. It is said that this rule should be followed, even in cases where there is neither obscurity, nor any thing equivocal in the law itself, for the reason, that the absurdity of the literal sense of the law does not proceed merely from the obscurity or any other fault in the expression, but from the narrow limits of the human mind, which cannot foresee all cases and circumstances, or include all the consequences of what is ordained. That it is impossible for the legislature to enter into immensity of detail. It can only make laws in a general manner, and in applying their acts to particular cases, the

(*a*) Domat's Civil Law, b. i. tit. i. sec. 2, pl. 7.
(*b*) Domat, p. 10.

construction ought to be conformable to the intention of the legislature. It cannot be presumed that the legislature intended any thing absurd. When, therefore, the words when taken in their obvious and proper sense, lead to it, it is necessary to turn them from that sense, just as far as is sufficient to avoid an absurdity, if from the whole purview of the law, and giving effect to all the words used in it, it may fairly be done.(*a*) The application of this rule is attended with less difficulty, when the words of the law are susceptible of two different senses; for then, the court will adopt that sense which will not lead to an absurdity.

§ 520. It is upon analogous principles, that although the general rule is, that the natural import of the words of any legislative act, according to the common use of them, when applied to the subject-matter of the act, is to be considered as expressing the intention of the legislature, unless the intention so resulting from the ordinary import of the words, be repugnant to sound acknowledged principles of national policy. Yet, if that intention be repugnant to such principles, then the import of the words ought to be enlarged, or restrained, so that it may comport with those principles, unless the intention of the legislature be clearly and manifestly repugnant to them.(*b*)

§ 521. In consequence of the application of these maxims, similar expressions in different statutes, and sometimes in the same statute, are liable to, and do receive different constructions, so that the true intent of the legislature may prevail. In the report of the judges,(*c*) this rule was applied. The question submitted to the judges for their opinion was, whether aliens were ratable

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(*a*) Carthew, 134; *United States* v. *Fisher*, 2 Cranch, 400.

(*b*) Report of Judges, 7 Mass. R. 523.

(*c*) 7 Mass. R. 523.

polls, within the intent and meaning of the constitution of Massachusetts; and whether the towns, in ascertaining the number of their ratable polls, in order to determine the number of representatives they were entitled to send to the house of representatives, could constitutionally include in that number, aliens resident in said towns, and predicate a representation on such resident aliens; and whether such representation could constitutionally be predicated on the number resulting from the including in the number of polls, aliens resident in any towns within the commonwealth, and taxed and paying taxes therein.

§ 522. It was by them held, that although by the constitution, the elector of a senator must be an inhabitant of the senatorial district in which he votes, and the elector of a representative must have resided one year in the town, before he could there be a voter. Although an alien might be an inhabitant of a district, because he might there dwell or have his home, yet, that he could not vote; although he might be estimated among the ratable polls. After citing the rules above laid down, they say: "Now we assume, as an unquestionable principle of sound national policy, that as the supreme power rests wholly in the citizens, so the exercise of it, or of any branch of it, ought not to be delegated to any but citizens, and only to citizens. It is therefore to be presumed, that the people, in making the constitution, intended that the supreme power of legislation should not be delegated but to citizens; and if the people intended to impart a portion of their political rights to aliens, this intention ought not to be collected from general words which do not necessarily imply it, but from clear and manifest expressions which are not to be misunderstood. But the words, "*inhabitants*," or "*residents*," may comprehend aliens; or they may be restrained to such in-

habitants or residents who are citizens, according to the subject-matter to which they are applied. The latter construction comports with the general design of the constitution. There the words "*people*" and "*citizens*" are synonymous. The people are declared to make the constitution for themselves and their posterity; and the representation in the general court is a representation of the citizens. If aliens could vote in the election of representatives, the representation would not be of citizens only, but of others." But they also came to the conclusion, that the several towns, in ascertaining their number of ratable polls, in order to determine the number of representatives they were entitled to send, might constitutionally include of their ratable polls, the polls of aliens residing in their towns, who were by law ratable to public taxes, and predicate a representation thereon. In this conclusion, they restrained the general import of the words "*inhabitants*" and "*residents*," used in some parts of the constitution, to inhabitants and residents who were citizens, so that they might not unnecessarily fix on the people an intention of imparting any of their rights of sovereignty to aliens. And at the same time they used the words, "*ratable polls*," according to their common acceptation, on the ground, that there was no principle of construction authorizing a deviation from it; so as to deny to the legislature the right of making the estates and polls of aliens ratable; and that the taxes assessed on the polls and estates of aliens had no effect upon their political rights, but merely influenced the apportionment among the towns.

§ 523. A statute is to be so construed as that it may have a reasonable effect, agreeable to the intent of the legislature.(*a*) In one case,(*b*) we find this instance of

(*a*) *Gore* v. *Brazier*, 3 Mass. R. 523, 540; *Pease* v. *Whitney*, 5 Mass. R. 380; *Stanwood* v. *Pierce*, 7 Mass. R. 458; *Gibson* v. *Jenny*, 15 Mass. R. 205.

(*b*) *Pease* v. *Whitney*, 5 Mass. R. 380.

the application of this rule. A statute made landholders taxable for all lands in the town, in his own occupation, for the use of the school district in which he lived, but that his lands in the occupation of his tenants should be taxed for the use of the district in which the lands are included. By the subsequent general tax act, the assessors had a discretion vested in them, to tax the owner for lands in the occupation of the tenant, or to tax the tenant himself. It was contended, on the one hand, that this discretion extended as well to county and town taxes, as to state taxes. On the other hand, it was insisted, that this provision in the general tax act, did not extend so as to vest in the assessors this discretion, in assessing school district taxes. The court held, that although a subsequent statute would control the provisions of former statutes which were repugnant to it, according to its strict letter; but that there are exceptions to this rule, depending upon the construction of the last statute, agreeable to the intent of the legislature. If, therefore, the assessors, in making a school district tax, might by availing themselves of this discretion, counteract the equitable principle of equalising the school district assessments required in the first act, the general words of the general tax act ought not to be extended so as to produce that mischief, but should be constrained by a reasonable construction, on the principle that the legislature did not contemplate any alteration in that statute. That by the first statute, a school district, when defined, might vote to raise money for several purposes, as for instance, to build a school-house for the use of the district; and this money was to be assessed on the polls and estates of the inhabitants comprising the district, and on the lands belonging to non-resident owners, and the legislature manifestly intended, that the property of any man once lawfully assessed for the uses of one district, should not be again assessed for the use of

another district. And to secure this intent, the lands of non-resident owners, were to be assessed to the use of one and the same district, and could not afterwards be assessed to the use of another district, and this provision was made that the same lands might not be twice charged in two districts. If this discretionary election in the assessors were to be allowed, then, if in one year a school-house was to be erected in the district where the owner dwelt, and a sum of money was voted for that purpose, the assessors might assess the owner for his land in the occupation of his tenant living in another district; and afterward, even in the same year, if the district in which the tenant lived should also vote money to build a school-house, the assessors having this discretion, might for this tax assess the tenant for the lands in his occupation, and thus a portion of the owner's land, would be charged in two districts with the building of two school-houses, which would be manifestly against the intention of the statute. That intention clearly was, that in defining the district, a resident owner having land in his own occupation, should be assessed for all the lands in the district in which he lived, and his lands in the occupation of his tenants, should be assessed in the district in which the tenant lived.

§ 524. The same principle was applied in another case,(*a*) where a turnpike road was authorized by the legislature to be located and made from Bowdoin College to a certain place in Bath, and the sessions whose duty it was to lay out the road laid the same seventeen rods distant from the college buildings, and eight rods from the lands appropriated to the use of the college, it was held to be well laid out within the intent of the legislature: that if the legislature, by "*Bowdoin College*," in-

(*a*) *Stanwood* v. *Pierce*, 7 Mass. 458.

tended in the statute the college buildings, it was not well laid out; but if the legislature, by "*Bowdoin College*," intended not any particular building, but the land holden by the trustees, on which to erect suitable buildings to accommodate the students, their instructors and governors, then a different construction ought to be given to the powers vested in the sessions: that the latter was the intent of the legislature was evident, as the word "*college*" is more naturally applied to the place where a collection of students is contemplated, than to the hall or other buildings intended for their accommodation.

§ 525. We find another instance of the application of this rule. In *Gibson* v. *Tenney*,(*a*) under chap. 100 of L. 1805, one swine was exempt from attachment for debts, and the question in that case was, whether a swine which had been butchered, but not cut up, the debtor at the time having no other swine, was exempt from attachment. Ch. J. Parker said: "The question presented was more curious than difficult. For if they were to be governed at all, by the manifest intention of the legislature, in making the exemption of a swine from liability to attachment or execution, they must give the exemption effect in that case. For what could have been intended but the sustenance of a poor family, by this exemption. That to give the strict construction contended for, would be to convert the intended benefit into an injury, for the swine would be protected until it became fit for food, and then be at the mercy of the creditor. In answer to the position taken, that this statute was in derogation of common law, and to be construed strictly, he admitted this was true, but that it was also to be construed sensibly, and with a view to the object aimed at by the legislature."

(*a*) 15 Mass R. 205.

§ 526. The same rule was adopted and applied in the case of *Thompson* v. *Egbert.*(*a*) That case arose under the statute of New Jersey, which enacted, "If a husband shall hereafter devise to his wife, by a will duly executed to pass real estate, any lands or real estate for her life or otherwise, and without expressing whether such devise to her is intended to be in lieu or bar of dower or not, and the said wife shall survive her husband, that then said wife should not be entitled to dower, in any lands or real estate devised by her said husband, unless she shall, in writing, express her dissent to receive the said lands or real estate so devised to her, in satisfaction and bar of her right of dower in other lands," &c. A widow had lands devised to her by her husband, of which she had been evicted by title paramount, and the question was whether she was barred of her dower. The court held, that had the demandant continued in possession of the lands devised, she would, of course, have been barred of her dower under this statute. But as she had nothing under the will, if her temporary continuance in possession should deprive her of her dower, it would be manifestly against right. That whatever might be the literal signification of the words of the statute, it would be contrary to the spirit and intent of the act to make it embrace such a case. That in reference to jointures, if a widow be evicted of any part of it, it was expressly provided that she should be endowed of a proportionate amount of the residue of the husband's lands. So in reference to other testamentary provisions, in money or other chattel interest in satisfaction of dower, the court of chancery, after acceptance and enjoyment by the widow, will allow her to refuse it and claim her dower. This showed the gen-

(*a*) 2 Harr. N. J. R. 459.

eral leaning of the courts and legislatures in favor of widow's rights, that dower was one of the favorites of the law. But if the construction contended for should be adopted, it would be otherwise in New Jersey. That the effect of such a construction in all similar cases would be, either to compel the widow to refuse the testamentary provision which was made in lieu of dower at once, or take the hazard of the insolvency of the estate. That nothing short of a manifest intent upon the part of the legislature, so clear as to leave no doubt, would justify a construction so harsh and unjust. That there was nothing plainer than that the general scope and intent of the legislature was to carry into effect the will of the testator. That this general intent characterized the whole course of legislative and judicial decisions. If it should declare that the widow had in this case not only lost the testamentary provision, but likewise her right of dower, it would violate the intent of the testator, expressed in his will, as well as the real and benevolent intent of the law, which has in general so carefully protected the rights of the widow. There could be no doubt, when the legislature said, "If a husband shall hereafter devise to his wife, by will duly executed to pass real estate, any lands or real estate for life or otherwise," &c., it should be a bar to a claim of dower, it was meant and intended that such devise should take effect according to its terms. That no other construction could be put upon this section consistent with the general scope and end of legislation on this subject. That it was not the object of the statute to bar her dower in such a case.

§ 527. It is never to be presumed that the legislature had nothing in view in making a law; hence it is another rule that a statute should never be so construed as to render it a nullity, or quite elude its force, but such a construction ought to be put upon it as that it shall have

its full force and effect, and not to be made vain and illusive.(*a*) In mixed interpretation the rule prevails that we must give to all doubtful words or expressions that sense which will make them produce some effect, and this effect must in general be a reasonable one, and it must likewise be the same that the law makers intended to produce. By this we mean that they are to be so construed as to give them some meaning; for to take them in any sense that will make them produce no effect, is in reality to give them no meaning at all. The rule, therefore, of taking all doubtful words or expressions in such a sense as will make them produce some effect, amounts to the same thing as if we had said that all the words are to be construed in such a manner as will give them some meaning. Any other construction of them, instead of pointing out the intention of the law makers, is to suppose the law makers to have used the words without any intention at all. If the words or expressions are ambiguous, and are susceptible of two senses, either of which will produce some effect, the rule then goes further, and says that the effect must be a reasonable one.(*b*) This rule is founded in reason and good sense: for since the reason of a law consists in the end which the law makers intended to obtain, or in the effect which they intended to produce by it; and since it cannot be supposed that they intended the end, without intending the means, if we give the words such a meaning as to make the law produce the effect which they intended to produce, we give them such a meaning as is agreeable to their intentions. This rule proceeds from the same general principles, from the necessity of giving the words the sense which it is presumed are comformable to the intent of the legislature:(*c*) and this is conformable to

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(*a*) Hob. 97. (*b*) Rutherf. b. 2, c. 7, sec. 8.
(*c*) Vattel, b. 2, c. 17, sec. 282, p. 381.

the rule of the civil law, that when a law was applied to a case included in its terms, there followed a consequence evidently contrary to the intention of the lawgiver, the law ought not to be extended to that case.(*a*)

§ 528. If a statute makes use of a word, in one part of it, susceptible of two meanings, and in another part it is used in a definite sense, it is to be understood throughout in the latter sense, unless the object to which it applies, or the connection in which it stands, require it to be differently understood in the two places, but it should upon the whole be so construed that, if possible, no clause, sentence or word will be superfluous, void or insignificant.(*b*) Where the words of a statute are susceptible of two meanings, the one favorable and the other hostile to its principal design, the former should prevail and control the construction.(*c*) In the case of *James v. Dubois*, the question arose whether the act of 1784, relative to entailments, limited and cut down estate tail created by deed, as well as estates created by devise. The doubt arose from the last clause of the second section, which provided—"And that no *entailment* of any lands or other real estate shall continue to entail the same, *in any* case whatever, longer than the life of the person to whom the same *hath been* or shall be first *given* or devised by such entailment." It was insisted that the word entailment in this clause must be understood to mean *devise*, because this same word, in a preceding clause, was used as synonymous with that word. It was admitted that it was so used in the preceding clause, for the reason that the act used the two words in the following connection: "Agreeable to the *devise* or *entailment*, after the decease of the

(*a*) Domat, b. 1, tit. i. sec. 2.

(*b*) *James* v. *Dubois*, 1 Har. 285; *Den* v. *Schenck*, 3 Halstead, 34; *Den* v. *Clark*, Coxe R. 359.

(*c*) *Lott* v. *Wyckoff*, 1 Barber Sup. Court R. 635.

first *devisee*, to all the estate in the *devised* premises, which the testator was entitled to, or could have *devised*;" thus qualifying and limiting the sense in which the word *entailment* was then used to entailment by *devise* only: for had the legislature intended to use the word *entailment* as synonymous with *deed* or *gift*, as distinguished from *devise*, they would have said, in the latter part of the sentence, "After the decease of the first *devisee*, or *donee*, or, *grantee*, to all the estate devised or *granted* premises to which the testator or *grantor* was entitled or could have devised or granted." That such must have been inevitably the structure of the sentence, if the legislature had in the body and previous part of that section been legislating about deeds, as well as wills. That therefore they were compelled to understand the word "entailment," in that part of the act, as tautological or unnecessary, or at most meaning the same thing as devise. In answer to the argument, that the word "entailment," in the last clause of the section, ought to be restrained to the same meaning, not only because all the preceding part of the act related to *devises*, but because the last clause of the second section did not profess to introduce a new or distinct topic of legislation, but was connected by the conjunction "and" with what preceded it: the court said: "It is no doubt a rule of construction, that if a statute makes use of a word, in one part of it, susceptible of two meanings, and in another part of the statute the same word is used in a definite sense, we are to understand it throughout in that sense, unless the object to which it is applied, or the connection in which it stands, requires it to be differently understood in the two places. But then there is another rule,—viz., that a statute ought, upon the whole, to be so construed, that if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant. That by testing the clause by this rule,

give the word "entailment," as there used, the meaning contended for, and how would it read?—for if "entailment" means *devise*, we must read it so: it would then read—"And no devise of any lands shall continue to entail the same, in any case whatever, longer than the life of the person to whom the same hath been or shall be first *given* and *devised* by such *devise*." This would not only be a very badly constructed sentence, but it would render the whole clause nugatory, superfluous, and insignificant. It would be a useless and unmeaning repetition in general terms of what had before been specifically enacted. They were therefore not at liberty to reject this clause of the statute, where, without any violence to the words or to the grammatical rules of construction, it was susceptible of a substantive and important meaning, and that too upon a subject relating to, and connected with, the avowed object of legislation indicated by the title of the statute itself, which was "to limit estates in tail." That there was another circumstance that led to the conclusion that the legislature intended, by this general clause, to reach estates created by deed—that was, that in this clause, the legislature had used for the first time, in the statute, the word "given." They do not say "to whom the same shall be first entailed or devised," but "shall be first given or devised by such entailment. Now the word "given," in its appropriate legal sense, is applicable to deeds as well as wills, and, so understood, it gives effect to that word, and a very important effect too. It gives it a place and meaning in the statute, by making the statute embrace estates created by deed as well as by will, whereas if we read it as synonymous with devise, it is unmeaning and worse than useless—ought to be stricken out, and must be rejected, which we have no right to do if we can usefully and sensibly employ it where we find it."

§ 529. This case is illustrative of both of the rules last

above stated, and the circumstances and qualification under which they are to be adopted. These rules have, like all other rules of construction, for their object, the effectuation of the intent of the legislature in every possible given case, where the reason or necessity for construction arises. As the legislature can never be presumed to intend manifest injustice, cruelty or oppression, no such construction ought to be put upon a statute as will punish or damnify the innocent,(*a*) nor so as to delay justice,(*b*) nor so as to extend a new remedy or a new jurisdiction when it is a summary one.(*c*)

§ 530. In ascertaining the intent of the legislature, it is important in the first place, that we should know what the common law was before the making of the statute, for thereby it may be seen whether the statute be introductory of a new law, or only affirmative of the common law. This, it has been said, is the very lock and key that sets open the windows of the statute.(*d*) Further, as a rule of exposition, statutes are to be construed in reference to the *principles* of the common law. For it is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required. The law rather infers that the act did *not* intend to make any alteration, *other* than what is specified, and *besides* what has been plainly pronounced; for if the legislature had that design, it is naturally said, they would have expressed it. It was observed by the judges in the case of Stowell and Zouch, that it was good for the expositors of a statute to approach as near as they could to the *reason* of the common law.(*e*) The best interpretation of a

(*a*) 1 Inst, 360.
(*b*) 2 Inst. 611.
(*c*) Barb. 106.
(*d*) 2 Inst. 301; 3 Rep. 13; Hob. 83.
(*e*) Plowd. 365.

statute, say other cases, is to construe it as near to the rule and reason of the common law as may be, and by the course, which *that* observes in other cases.(*a*) Such, indeed, has been the language of the courts in every age; and when we consider the constant, vehement, and exalted eulogy which the ancient sages bestowed upon the common law, as, "the perfection of reason," and the "best birthright and noblest inheritance of the subject," we cannot be surprised at the great sanction given to this rule of construction, and its careful observance.(*b*)(*c*) When a statute alters the common law, the meaning shall not be strained beyond the words, except in cases of public utility, when the ends of the act appear to be larger than the enacting words (*d*) This intention of the makers of a statute may also sometimes be discovered from the cause or necessity of making the act. To this end it is proper to inquire, what was the mischief against which the common law had not provided. The cause and reason of the act, or in other words, the mischief requiring a remedy, may either be collected from the statute itself, or discovered from circumstances extrinsic of the act. The mischief may be discovered *aliunde;* the remedy from the act itself; and then the safe and established rule of construction is, that the intention of the lawgiver, and the meaning of the law, are to be discovered and deduced from a view of the *whole* and every part of a statute taken and compared together.

§ 531. Another fundamental rule of construction of a statute is, to construe it according to the sense of the terms, and the intention of the legislature, to be gathered from the words used. In the ascertainment of that in-

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(*a*) 1 P. Wms. 252; 2 Inst. 148, 301; 1 Sand 240.
(*b*) 1 Kent's Comm. 434.
(*c*) 1 Dwarris on Statutes, 695.
(*d*) Ib. 696.

tention, the contents, the subject-matter, the effect, and sometimes the consequences, as well as the reason and spirit of the law are to be considered.(*a*) The difficulty as well as necessity in the application of this rule in construction, as has been seen, arises from the fact, that such is the imperfection of human language, that the ideas of men are not always distinct and perfectly determined, and the terms used by the law-makers cannot always be so specific and precise as not to be susceptible of but one meaning; hence frequently, contradictions and inconsistencies, either real or apparent, present themselves in relation to different parts of the same statute; hence there arises necessity for establishing rules founded in reason and authorized by the law of nature, which are capable of diffusing light on what is obscure, and determining what is uncertain.(*b*)

§ 532. It was a rule in the civil law, that those obscurities, ambiguities, and other defects of expression which may render the sense dubious, and difficult to arrive at a right understanding of, and justly applying the language to particular cases, ought to be solved by the sense which is the most natural, that has the greatest relation to the subject-matter, and the most consonant to the intention of the law-makers, and agreeable to justice. That this will best be discovered by taking into consideration the words and the nature of the law, its motives, and its relations to other laws, from which may be discovered its spirit and its genuine sense.(*c*) The common law courts have substantially adopted these rules, and have held, that the words ought always to be well considered, and should generally be understood in

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(*a*) Black. Com. 59, 60; Ayliffe's Pandects, b. 1, tit. 4, p. 25; 1 Domat, prelim. b., p. 9.

(*b*) Vattel, b. 2, c. 17, sec. 272.

(*c*) Domat, prel. book, tit. 1, sec. 2, p. 12.

their usual and most known signification, unless that sense is repelled by the context,(*a*) not so much regarding the propriety of grammar, as their general and proper use; and if they happen to be dubious, their meaning may be established by the context, or comparing them with other words in the same law, and by the subject-matter, with reference to which the expressions are used, the reason and spirit of the law, or the causes which led to its enactment; that these are the best exponents of the words, and the safest rules by which to limit their application.(*b*)

§ 533. We have in previous chapters considered the question of retrospective laws. The power of the legislature to pass such acts independent of any constitutional restriction upon legislative power, and also the constitutionality of such acts. As a question of construction merely, it is a general rule that statutes are not to be construed retrospectively, or to have a retroactive effect, unless it shall clearly appear that it was so intended by the legislature, and not even then if by such a construction the act would divest vested rights.(*c*)

§ 534. Whenever a statute uses a technical term which is known, and its meaning clearly ascertained, by the common or civil law, from the one or the other of which it is obviously borrowed, it is proper to refer to the source from which it is taken, for the purpose of ascertaining its meaning. Thus, in the case of *The United States* v. *Jones*,(*d*) the act of Congress made "mur-

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(*a*) 6 Pet. R. 102.

(*b*) Woode's Elem. Jurisp. 36; Story on Constitution, 304.

(*c*) See *Gilmore* v. *Shuter*, 2 Shower, 16; S. C. 2 Mod. 310; Jones, 108; 2 Ld. Raymond, 1352; *Holden* v. *James*, 11 Mass. R. 396; *Lewis* v. *Webb*, 3 Greenl. 326; *Dash* v. *Van Kleek*, 7 J. R. 477; *Lewis* v. *Brackenridge*, 1 Black. R. 220; *Prop. Ken. Purchase* v. *Laboree*, 3 Greenl. 275; *Wilkenson* v. *Leland*, 2 Pet. R. 627; *Satterlee* v. *Matthewson*, 2 Pet. R. 380.

(*d*) 3 Wash. C. C. R. 209.

der" and "robbery" on the high seas acts of piracy. It was contended, that as robbery on land had not been declared by an act of Congress to be a capital offence, it was not declared, by the act under which the indictment was found, to be piracy, if committed on the high seas. Washington, J. held this was by no means the correct construction of the law. Murder and robbery, committed on the high seas, were declared to amount to piracy, *and also* any other offence which would be punishable with death, had it been committed on land. It was clear that the words "which, if committed within the body of a county," &c., related not to "murder or robbery," but to the words immediately preceding "or any other offence." That all that remained was to ascertain the meaning of the word "robbery," and it was admitted that the common law definition of the term might be resorted to. That if a statute of the United States uses a technical term which is known and its meaning fully ascertained by the common or civil law, from the one or the other of which it was obviously borrowed, no doubt could exist that it was necessary to refer to the source from whence it was taken for its precise meaning.

§ 535. Also, when a statute uses a word, the meaning of which is well ascertained at common law, the word shall be understood in the statute in the same sense in which it is understood at common law.(*a*) We have already seen that it was a rule of the civil law, if technical terms are used, or terms proper to the arts and sciences, they should commonly be interpreted according to their technical sense, or to the definitions given them by the masters of those arts and sciences, or of persons versed in the art to which the terms belong. But if the terms relate to things that admit of different degrees,

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(*a*) *Kitchen* v. *Tyson*, 3 Murphy, 314.

there ought not to be a scrupulous adherence to technical definitions.(*a*) Whenever such terms of art or peculiar phrases are made use of, it must be supposed that the legislature had in view the subject-matter about which such terms or phrases are commonly used.(*b*)

§ 536. This rule, in one case, was considered under a statute which provided that the coroner should serve all writs and precepts when the sheriff or his deputy should be a *party*. The deputy, in this case, served the writ on the defendants, who were a corporation, he being at the time a stockholder and member of the corporation. The question raised in the cause was whether, under those circumstances, the deputy was a *party* to the suit within the meaning of the statute. The court, in that case, held—"It was plain they were called upon to decide whether Daniel Dutch, who made the service of this writ, was a *party* to the suit. That he was interested in it, admitted of no question. They were to ascertain the true meaning of the legislature in the use of the words of their statute, and were to consider them, when legislating upon subjects relating to courts and legal process, as speaking technically, unless from the statute itself it appeared that they made use of the term in a more popular sense. The word "*party*" was unquestionably a technical word, and had a precise meaning in legal parlance. By it was understood he or they, by or against whom a suit is brought, whether in law or equity; the party, plaintiff or defendant, whether composed of one or more individuals, and whether natural or legal persons. They were parties in the suit and parties on the record, and all others who might be affected by the suit indirectly, or consequently were persons interested, but not parties. And it was clear that the legislature used the

(*a*) Vattel, b. 2, c. 17, sec. 276, 277.

(*b*) *The Merchants' Bank* v. *Cook*, 4 Pick. 405.

word in this sense, for in one clause in the same section they require that the writ should be served by a coroner where the sheriff or his deputy was a party, and in another they require another duty of the coroner where the sheriff should be *interested* or related to either of the parties." The same doctrine, under a similar statute, was held in the case of *Adams* v. *Wiscasset Bank.*(*a*)

§ 537. The word "plaintiff," when used in a statute according to the ordinary usage and acceptation of the term, would, in accordance with the rules above stated, seem to mean the party plaintiff upon the *record*, and so it was decided by the supreme court of New York, under the second and eighth sections of the act to prevent usury, passed in 1837, which authorized, under certain circumstances, the calling of the "plaintiff" as a witness to prove the usury. That court held that the statute was confined to the plaintiff on the record, and did not extend to the party who was the plaintiff in interest.(*b*) The court for the correction of errors, however, in the same case in error,(*c*) reversed that decision, and by a vote of fifteen to five, resolved that the word "plaintiff," in the second and eighth sections of the act above referred to, extended to the *party in interest as plaintiff*, although he might not be the *plaintiff on the record.*(*d*) This decision we cannot but regard as a departure from the general principle of construction which prevails in ordinary analogous cases, and according to our own view of the rule, we should feel no hesitation in coinciding with the views of the supreme court and those expressed in the dissenting opinions of Senators Putnam and Rhoades in

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(*a*) 1 Greenl. 361.

(*b*) *Henry & Pierce* v. *The Bank of Salina*, 1 Hill R. 555.

(*c*) 5 Hill R. 523.

(*d*) See also *Stephen et al* v. *White*, 5 Hill, 548; *Hart* v. *Oatman*, 1 Barber Sup. Court R. 229.

the case in 5 Hill, 523. We cannot but regard this decision of the court of dernier resort as the supplying of a *casus omissus* in a statute by judicial legislation, and that too in the case of a penal statute, instead of having the statute extended to meet the defect by that department of the government whose duty it is to enact statute law.

§ 538. The question arose, in another case,(*a*) as to the sense of the word "supersede," as used in the militia law of Massachusetts. The court held, that the only way to ascertain the sense of the legislature, in using the word "supersede," was to learn the militia sense, in which the word is commonly used. That in the enactment of laws where terms of art or peculiar phrases are made use of, it must be supposed that the legislature had in view the subject-matter about which such terms or phrases were usually employed. That in a military sense, *to be superseded* meant to have one put in the place of another, and that this sense was natural and consistent with the common understanding of the term. That by an extraordinary promotion in the militia, no officer was superseded except the one who, in the ordinary course of promotion, would have succeeded to the vacant office.

§ 539. In another case,(*b*) a question arose whether a judgment for past damage given by a statute for flowing waters by a mill-dam, precluded an assessment, or subsequently assessing damages, under a statute which provided, that "while the jury were assessing the annual damages, and determining for what time and to what extent the mill owners might flow, they were required to appraise the gross amount, which should be paid for the perpetual right of flowing; and an election between

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(*a*) *Ex parte Hall*, 1 Pick. 261.

(*b*) *Snell* v. *Bridgewater Cotton Gin Manufactory Co.* 21 Pick. 298.

annual and gross damage was given to the land owner." That "the verdict being returned, *judgment* should be *final*, any law or usage to the contrary notwithstanding." It was contended, that the judgment was to be conclusive, not only for the gross damage, when they were elected, but also for the annual damages when the judgment was rendered for them, so as to preclude any new assessment or judgment for subsequently accruing annual damages. This question necessarily involved the question, as to the sense in which the word *final* was to be understood. The court held that it might be reasonable and in accordance with the usage and sound principles of law, that the judgment for the gross damages should, while unreversed, be conclusive. But, when it undertook to fix a prospective rule for the recovery of damages which had not accrued, it would seem unreasonable and unjust to make it conclusive. That the damage might be greater or less than was expected. The effect of the flowing might, on experiment, prove to be different from what was anticipated, the value of the land or its precincts might vary, and many circumstances might occur in the lapse of time, which would render a new appraisement indispensable to the equal distribution of justice between the parties. Although the language of the statute upon this point was not clear, yet inasmuch as the object of the legislature was to provide a means of ascertaining the value of a perpetual servitude upon the plaintiff's land, and not to affect the appraisement of annual damages, or to impair his right to recover them, the fair presumption was, that the language of the statute might be fully satisfied without adopting a construction which seemed absurd or mischievous. That the distinction between *final* and *interlocutory* judgment was familiar to every lawyer. *Interlocutory* judgments were such as were given in the middle of a cause, and did not finally determine and complete the suit. *Fi-*

nal judgments were such as at once put an end to an action. The word *final* was often used in statutes in in this, which was its proper legal sense. That it must be regarded as used in that sense in this statute.

§ 540. Under the statute of 1790, c. 9, sec. 28, which required, in capital cases, a copy of the indictment, &c., should be delivered to the prisoner two entire days before the *trial*,(*a*) it was held, that the word "trial" meant the trying of the cause by the jury, and not the arraignment and pleading preparatory to such trial. In this case Judge Story says, "The question is, what is meant in this statute by the words 'before he shall be tried,' and 'before the trial,' for they are doubtless equivalent; do they mean that the copy shall be delivered two days before the jury is sworn to try the cause upon the issue of fact, or do they mean, before the party is arraigned on the indictment and put to plead, and before it is ascertained, whether by his plea, there will be a trial by a jury or not." He then held, that he was clear in the opinion, that upon the statute itself, the true meaning was, that the copy should be delivered two days before the cause was tried by the jury, and not before the party was arraigned on the indictment. His reasons for this opinion were, first, that this was the natural exposition of the intent and object of the enactment; secondly, that it was the legal and technical meaning of the word "trial," in the sense of the common law; that it was admitted that the legislature might use technical words in an untechnical sense, and when from the context, this is ascertained, it was the duty of the court to construe the words according to the legislative intent; that it was equally its duty to follow such intent when the legislature uses untechnical words in a technical sense; that in

(*a*) *The United States* v. *Curtis*, 1 Mason's R. 232.

each case indeed, the duty of the court was the same, to carry into effect the object of the legislature, so far as it was expressed, and to give a suitable exposition of the terms according to the fair import of the language. But where the legislature uses words which have an appropriate sense in the common law, that sense is supposed to be the one intended by the legislature, unless the context shows that a different sense was in fact intended. That in the sense of the common law, the arraignment of the prisoner constituted no part of the trial. It was a preliminary proceeding, and until the party had pleaded, it could not be ascertained whether there would be any trial or not. He then cited Blackstone and Hale, that "to arraign is nothing else but to call the prisoner to the bar of the court, to answer the matter charged upon him by the indictment," and that "after the prisoner had pleaded, and put himself upon the country, the next thing in order of proceeding was *trial* of the offender." And the like distinction between arraignment and trial was taken in *Sayer's case* in 1772, and was universally recognized.

§ 541. Where a criminal prosecution under a statute was to be instituted on complaint, a complaint under oath or affirmation is implied as a part of the technical meaning of the terms.(*a*) The ordinary and usual meaning of the word "deposition" is confined to written testimony, at least in legal proceedings; hence it has been held, that congress in legislating upon this subject must be presumed to have used the word in its legal sense. It was said in one case in which this rule obtained, that there would not be found an instance in the United States laws where the word had been used in a different sense. In the act of 24th September, 1789, ch. 20, sec.

(*a*) *Campbell* v. *Thomson*, 4 Shepley, 117.

30, in which congress had provided for the taking of depositions of witnesses under certain circumstances, the language was, that the "deposition" of such person may be "taken," and throughout the whole section the word was used to denote the written testimony of a witness in contradistiction to oral testimony.(*a*)

§ 542. Under the crimes act of the United States of 1825, ch. 276, sec. 10, it is provided, that no master, &c., shall, during his being abroad, *maliciously* and without *justifiable cause*, force any officer or mariner of such ship or vessel on shore. In one case,(*b*) a question was raised as to the meaning of the words "maliciously," and "justifiable cause." It was held, that "maliciously," in the sense of the act, was not limited to acts done from hatred, revenge, or passion, but it included all acts wantonly done, that is, against what any man of reasonable knowledge and ability must know to be against his duty. That "justifiable cause" did not mean such a cause as, in the mere maritime law, might authorize a discharge; but such a cause as the known policy of the American laws on this subject contemplate, as a case of moral necessity, for the safety of the ship or the due performance of the voyage. That it arose only from extraordinary emergencies, and in extreme cases, where otherwise the safety of the officers or crew, or the due performance of the voyage, or the regular enforcement of the ship's discipline would be put in jeopardy.

§ 543. Under the judiciary act of the United States, the question has arisen as to the interpretation of the word "defendant," and it has been held, that although in its terms, it applies only to the case of a single defendant; but in its true interpretation, it cannot admit of a rational doubt, that it means the party defendant, whe-

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(*a*) *United States* v. *Clark*, 1 Gallison, 501, 2.

(*b*) *United States* v. *Coffin*, 1 Sumner, 394.

ther one or many, and that it must apply to cases where several aliens or several citizens of another state are jointly sued as defendants, for, in such cases each of them is in the very predicament presumed by the act.(*a*)

§ 544. The term *person* in a statute, embraces not only natural but artificial persons, unless the language indicates that the word is used in a more limited sense, in cases where a statute gives or provides a remedy by action or otherwise, to any person or persons. We are aware, however, that the decisions on this point are not uniform, and that it has been held by the supreme court of Illinois;(*b*) that an act giving the right to remove fences made by mistake upon the lands of other persons, applied only to natural persons, and had no application to fences erected on lands of the United States; and in that case and also in another case,(*c*) it was held, that in enactments of legislative bodies, when persons are spoken of, no other than natural persons will be intended, unless it be absolutely necessary to give effect to some powers already conferred on artificial persons, and which it was necessary should be exercised, to carry into effect the objects contemplated in their grant or charter.

§ 545. In the interpretation of statutes, if the words used express clearly the sense and intention of the law, they must always govern. For, as we have seen, it is not permitted to interpret what is plain and manifest, as it stands in no need of interpretation. When an act is conceived in clear and precise terms—when the sense is manifest, and leads to nothing absurd, there can be no reason to refuse the sense which it naturally presents to

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(*a*) *Smith* v. *Rines*, 2 Sum. R. 345.
(*b*) *Blair* v. *Worly*, 1 Scammon, 178.
(*c*) *Betts* v. *Menard*, 1 Breese,

the mind. To go elsewhere in search of conjecture, in order to restrain or limit an act, would be but to elude its force, and it will be perceived that such a course would be dangerous in the extreme; for if such a rule should be once established, the brighest light might shine on every letter and sentence of a law; it might be expressed in terms the most clear and determined, yet all this would be useless, were courts to search for foreign reasons to maintain what was not to be found in the sense it naturally presented to the mind.(*a*) Thus, in *Crocker* v. *Crane*,(*b*) it was held, where the meaning of a statute is plain, all technical rules as to the force or construction of particular terms must yield to the clear expression of the paramount will of the legislature; or where the meaning is manifest, the intention of the legislature should be carried into effect, even though apt words are not used in the act. A writer on American law says: "Where the intention of the legislature is found, there can no question arise, but that must be the rule and guide, for when perceived by judges, a deviation from it must be intentional, and so wholly unjustifiable. As judges may as well make a new statute of their own, and decide the case by it, as designedly to depart from the understood meaning and intention of the legislature. When the meaning is satisfactorily perceived and understood, there is no room for a liberal, or strict, or equitable, or large, or narrow, or other construction, than according to the meaning.(*c*) The Supreme Court of the United States have held, that where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature must be intended to mean what it has plainly expressed, and con-

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(*a*) Vattel, b. 2, c. 17, sec. 263. (*b*) 21 Wendell, 211.
(*c*) 6 Dane Ab. 600.

sequently no room is left for construction.(*a*) Mr. Dwarris lays down the rule thus: "But though the judges, in interpreting the law, are to explore the intentions of the legislature, yet the construction to be put upon an act of parliament must be such as is warranted by, or at least not repugnant to, the words of the act. Where the object of the legislature is plain and unequivocal, courts ought to adopt such a construction as will best effectuate the intentions of the lawgiver. But they must not, in order to give effect to what they may *suppose* to be the intention of the legislature, put upon the provisions of a statute a construction not supported by the words, though the consequence should be to defeat the object of the act.(*b*) Where the legislature has used words of a plain and definite import, it would be very dangerous to put upon them a construction which would amount to holding that the legislature did not mean what it has expressed. The fittest course in all cases where the intention of the legislature is brought into question, is to adhere to the words of the statute, construing them according to their nature and import, in the order in which they stand in the act of parliament.(*c*) The most enlightened and experienced judges have for some time lamented the too frequent departure from the plain and obvious meaning of the words of the act of parliament by which a case is governed, and themselves hold it much the safer course to adhere to the words of the statute construed in their ordinary import, than to enter into inquiry as to the supposed intention of the parties who framed the act.(*d*) They are not (as the most learned members of a learned body best know) to

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(*a*) 7 Cranch R. 52.

(*b*) *Rex* v. *Stoke Demerel*, 7 B. & C. 569.

(*c*) *Rex* v. *Ramsgate*, 6 B. & C. 712.

(*d*) *Rex* v. *Inhabitants of Great Bentley*, 10 B. & C. 520.

presume the intentions of the legislature, but to *collect them* from the words of the act of parliament; and they have nothing to do with the policy of the law. This is the true sense in which it is so often impressively repeated, that judges are not to be encouraged to direct their conduct "by the crooked cord of discretion, but by the golden metwand of the law;" *i. e.* not to construe statutes by equity, but to collect the sense of the legislature by a sound interpretation of its language, according to reason and grammatical correctness."(*a*)

§ 546. The rule we have been considering necessarily arises from what we have already seen, that it is only when there is some ambiguity or doubt arising from other sources, that interpretation has its proper office, and that it is only to be resorted to when there is obscurity as to the meaning, either from the doubtful character of the words, or from other clauses in the same statute, or from an incongruity or repugnancy between the words and the apparent intention derived from the whole structure of the law or its avowed object. As words are the common signs which mankind make use of to declare their intention, one to another, if those signs are definite, distinct and clear, there can be no need to have an interpreter of them. But as the legislature are but men, the language used by them is liable to all that uncertainty and imperfection that pertains to all that is of human origin or that emanates from finite minds. There will from necessity be more or less obscurity in the words used, and they will often be more or less obscure: sometimes they will express the meaning so imperfectly, as to either fall short or else exceed the intention, and express more than is designed, and then it is that the words themselves are to be interpreted. Great care should be

(*a*) 1 Dwarris on Statutes, 702, 703.

observed that we do not, in all such cases, confound *interpretation* with *criticism.* The end of the latter is, to find out what are the words of the law maker, and whether the same is genuine or forged—whether any part or material parts have been foisted in or omitted, or erased or altered. The end of the former is, to find what was the intent and meaning, and to clear up that meaning when obscure—to ascertain the sense of ambiguous words—to determine the design when imperfectly expressed.

§ 547. A remedial act should be so construed as most effectually to meet the beneficial end in view, and to prevent a failure of the remedy, and as a general rule a remedial statute ought to be construed liberally. Receiving an equitable, or rather a benignant interpretation, the letter of the act will be sometimes enlarged, sometimes restrained, and sometimes it has been said the construction made is contrary to the letter.(*a*) This rule will be illustrated in a subsequent chapter, when we come to consider the doctrine of equitable construction. It is proper, however, that we should here remark, that although it is true as a general rule that where the object of a statute is remedial, it is to be construed liberally, so that it may carry out the purposes for which it was designed. The rule has its qualifications, and we should keep distinctly in view a distinction which exists between the remedy merely and proceedings in the attainment of the remedy. In the former case, courts, when looking at the remedy, will take care that the statute shall be so construed as to make it effectual, if possible, in the manner intended; but in the latter case, courts, when scanning the proceedings in attaining that remedy, especially if it be summary in its nature, will be

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(*a*) Dwarris, 718.

strict and rigid in exacting a strict compliance with all the requisites of the statute.(*a*)

§ 548. We next proceed to consider how far consequences are to be regarded. As a general rule, courts, in the construction of statutes, are not to regard the consequences. This rule, however, is subject to some qualifications and limitations. Where the intent is doubtful, the consequences, resulting from a particular construction, may be regarded. This qualification must always be applied with great caution, and the influence it should have upon the construction must depend on the nature of each particular case to which it is to be applied, especially so in those cases where rights are to be infringed. But where fundamental principles are overthrown,—where the general system of the law is departed from, the legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such an object; and in such a case, courts will regard the consequences of a particular construction. Where, however, a mere political regulation is made, which is inconvenient, if the intention of the legislature is expressed, in terms which are sufficiently intelligible to leave no doubt on the mind; where the words are taken in their ordinary sense, it has been held, that it would be going too far to hold that a constrained interpretation should be put upon the statute to avoid any inconvenience. The reason for this is, that it is but reasonable to presume that the legislature contemplated such an inconvenience, as being probably overbalanced by the particular advantage the act was calculated to produce. The rule may, perhaps, be laid down, that where the construction of a particular statute is doubtful, an argument from inconvenience will have some

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(*a*) *Smith* v. *Moffatt*, 1 Barber Sup. Court Rep. 65.

weight, but where it is plain, the consequences are not to be regarded,—for that would be to assume legislative authority; and in all cases where consequences are regarded, great care should be taken that courts do not put such a construction upon a statute as quite to elude the force of it.(*a*)

§ 549. In the first case cited, in answer to the objection, that a particular construction of a statute would be inconvenient, the court say: "When the construction of a statute is doubtful, an argument from inconvenience will have weight. But in that case they held, that the construction of the statute then under consideration was not doubtful, but clear; and hence this rule did not apply. And in the second case cited,(*b*) it was held, that the argument of inconvenience could have no weight in the construction of a statute, except in doubtful cases. Courts will not construe a statute, so as to admit of an unjust consequence; hence it is, that no statute shall be so construed as to be against reason, and words are to be taken in a lawful and rightful sense. Mr. Dwarris in his treatise on statutes, says: "It is the office of an exposition to put such a sense upon the words of the statute as is agreeable to equity and right reason,(*c*) so that no innocent person shall receive any damage by a literal construction. Where a statute will bear two interpretations, one contrary to plain sense, the other agreeable to it, the latter shall prevail.(*d*) If words literally understood, bear only a very absurd signification, it is necessary to deviate a little from the primary sense."

(*a*) *Langdon* v. *Potter*, 3 Mass. R. 221; *Gore* v. *Brazier*, 3 Mass. R. 539; *The People* v. *Green*, 2 Wend. R. 277; 19 Vin. 521, sec. 93; 3 Mass. 221; *Ayers* v. *Knox*, 7 Mass. 306 to 310.

(*b*) 3 Mass R. 539.

(*c*) 1 Inst. 381.

(*d*) 8 Rep. 118.

Blackstone admits, that if out of acts of parliament there arise collaterally any absurd consequences, manifestly contradictory to common reason, such acts are, with regard to these collateral consequences void; such cases are indeed excepted out of the statute by common sense, and the nonsensical words are said to be controlled by the common law. We have heretofore shown how this opinion of Blackstone was considered by Christian, and what is to be understood by such acts being controllable at common law.

§ 550. It was held,(*a*) that where the literal interpretation of a statute would lead to a gross absurdity of restriction, the court would extend its application to cases within the same equity, though at the expense of *forcing* the construction of the words. It is said,(*b*) in doubtful cases, if by giving a literal construction to a statute it will be the means of producing great injustice, and lead to consequences that could not have been contemplated by the legislature, courts are bound to presume that the legislature intended no such consequence, and give such a construction as will promote the ends of justice.(*c*)

§ 551. In another case,(*d*) the court in reviewing the argument that a particular construction would be attended with great inconvenience, say: "The argument from inconvenience, may have considerable weight upon a question of construction, where the language is doubtful. It is not to be presumed upon doubtful language, that the legislature intended to establish a rule of action which would be attended with inconvenience. But where the language is clear, and where of course the intent is manifest, the court is not at liberty to be gov-

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(*a*) *Henry* v. *Tilson*, 17 Vt. R. 479.
(*b*) *Bryan* v. *Buckmaster*, Bre. app. 21.
(*c*) See Gilman's Dig. 187, sec. 5.
(*d*) *Putnam* v. *Langley*, 11 Pick. 490.

erned by considerations of inconvenience." Chief Justice Marshall says: "It is true, that where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain, in which case it must be obeyed."(*a*)

§ 552. In the case of *The People* v. *Canal Commissioners*,(*b*) it was held, that if it were apparent, that by a particular construction of a law in a doubtful case, such construction would be likely to endanger, or to actually sacrifice great public interests, it would not, and ought not, to be intended, that such a construction was contemplated by the legislature, in disregard of such interests. That it was not for the court to determine, whether an act of the legislature was impolitic or unwise, but its province was to ascertain its just, reasonable, and true construction, and when that was satisfactorily ascertained, it had but to pronounce the conclusion at which it had arrived. It was a rule of the civil law whenever the meaning of the law was plain and manifest, although courts could not readily perceive its motives, and there might seem to arise some apparent inconvenience which could not be avoided by a reasonable interpretation, they would always presume, that the law had its usefulness, and that it is founded in some view of the public good, which gave preference to its sense and authority over the inconvenience that might be arrayed against it, otherwise, many valuable and well established laws might be subverted and overthrown by subtlety of reasoning.(*c*)

§ 553. The cases above cited are sufficiently clear and explicit as to the rule itself, and the manner and caution

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(*a*) 2 Cranch, 386.

(*b*) 3 Scam. R. 160.

(*c*) Domat's Civil Law, prel. b. tit. i. sec. 2, p. 13.

with which it is applied by courts. At all times the court keep in view in this case, as in all others, the manifest intent of the legislature when that intent is clear and explicit, even at the expense of the dictates of sound reason and natural justice, unless the injustice of a particular construction is such as that it cannot be admitted without conflict with some fundamental principle of govermental policy, and the unreasonableness of it is so manifest as to repel the idea that the legislature could have intended to sanction it.

§ 554. The rule has been laid down thus: "Where the meaning of a statute is doubtful, the consequences may be considered;" but where the meaning is plain, no consequences are to be regarded in the interpretation, for this would be assuming legislative authority.(*a*) "The consequences are to be considered, for the court will not so construe an act of parliament as to admit of any absurd consequences. No statute shall be construed in such a manner as to be inconvenient or against reason, "words are to be taken in a lawful and rightful sense," as where the words were "where no fine is levied in the king's court," they are to be understood as fines levied by the husband and wife, which is lawful, and not as fines levied by the husband alone, which would work a wrong to the wife; and the general rule is, *quod non præstat impedimentum, quod de jure non sortitur effectum.*"(*b*)

§ 555. Statutes are divided into six parts. The parts of a statute in a popular sense are,—the title, preamble, purview or body of the act, clauses, provisos, exceptions. We shall in the next place consider the effect those parts are to have in the construction of statutes. We will consider each in the order above laid down.

(*a*) 10 Mod. 344. (*b*) Co. Litt. 381, b.; Stev. L. E. 23.

§ 556. For the purpose of ascertaining the intention of the legislature in certain cases, and under great stress of doubt, resort may be had to the title of a statute. It has been held that the title is no part of the statute, for the reason that in England it is usually framed by the clerk of the house in which it is first passed, and is seldom read more than once.(*a*) This reason does not hold good in this country, for here the legislature make the title as well as the preamble and body of the statute; still however, here, as in England, the title is not intended to be, nor is it considered, as part of the enacted law, and is introduced merely as a name. The title of statute is but a new usage, and began about the 11th Henry VII.(*b*) Holt, Ch. J., says, "It is true, that the title of an act of parliament is no part of the law or enacting part, no more than the title of a book is a part of the book, for the title is not the law, but the name, or description given to it by the makers.(*c*) For this reason it was formerly held, that the title was not to be regarded in the construction;(*d*) hence, in *Chance* v. *Adams*,(*e*) it was said, that as the title was no part of the act, it was mere surplusage, and a misrecital should not vitiate, and it was so adjudged in the case in the house of peers, between *Darwyn and the Earl of Monmouth.* Although the title is a very unsafe guide to assist the mind in ascertaining, even in a general way, the scope or purport of the act;(*f*) yet, when the mind labors to discover the intention of the legislature, it seizes upon every thing, even the title, from which aid may be derived.

(*a*) 1 W. Blacks. R. 95.

(*b*) Per Treby, J., Hard. 324.

(*c*) *Rex* v. *Williams*, 1 W. Bl. 95. See also *Poulter's case*, 3 Rep. 33. Barrington on Statutes, 449, in note.

(*d*) Bac. Abr. tit. Statute, I.

(*e*) 1 Lord Raymond, 77.

(*f*) 6 Mod. 62.

§ 557. In the case of *The United States* v. *Fisher*,(*a*) the court remarked. "On the influence which the title ought to have in construing the enacting clause, much has been said, and yet it is not easy to discover the points of difference between the opposing counsel in this respect; neither party contends that the title of an act can control plain words in the body of the statute, and neither denies, that taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the legislature, it seems every thing from which aid can be derived may be resorted to; and in such cases, the title claims a degree of notice, and will have its due share of consideration." It may, in some cases, be a key which opens to the mind the general scope and import of the act, or the inducements which led to the enactment, and thus point to the polar star of construction, that is, the intention of the lawmakers, which has always been held as the only true guide in the construction of all statutes. But as the title is usually drawn without much deliberation, unless it points with great precision to the object and scope of the act, it must always be regarded as a very unsafe and unsatisfactory expositor of a law. It is seldom that it alludes to the subject-matter of the act, and even in cases where it does so, it is in general and sweeping terms, embracing within its scope not more than one or two of the multifarious matters to which the enacting part extends, and it will be found in almost all cases, that the enacting part goes much beyond either the title or preamble, and it must, as has already been remarked, be resorted to only in those cases where there is great stress of doubt as to the intention of the legislature, and is no

(*a*) 2 Cranch R. 386.

farther to be relied on, than it serves when taken into consideration with the enacting part, to complete the chain by which the mind may be drawn to a conclusion on the great question of the real intent and design of the act.(*a*)

§ 558. It is said, in a note to the Philadelphia edition of Bacon on Abridgment, "But in the more ancient statutes, which are penned with less precision and detail, the title is often material, as in the statute 4 Edw. 3, c. 7, giving a remedy to executor for certain trespasses, and 7 East R. 132–4, is referred to as an authority on that point." The case referred to, however, is not an adjudication to that effect. However it may be in England, it has been held in this country the title may in some instances claim some degree of notice.

§ 559. In the case of *United States* v. *Palmer*,(*b*) it is said that the title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature; and in that case the title was resorted to by Chief Justice Marshall, in the determination of what crimes were intended to be included in an act of Congress. Other cases have held that the title of an act may be resorted to, to aid in the interpretation.(*c*) It is now the constant practice, in courts of justice, for both the counsel and the court, in examining a statute of doubtful import and meaning, to refer to the title in aid of a particular construction.

§ 560. *The Preamble.*—In England, and in some of the states of this Union, it has been and still is the practice to preface statutes with a preamble which was at one time supposed to contain the motive and induce-

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(*a*) 1 Kent's Com. 464; 3 East, 165.

(*b*) 3 Wheat. 610.

(*c*) *State* v. *Stephenson*, 2 Bailey, 334; *Burgett* v. *Burgett*, 1 Ham. 219.

ments of the legislature in passing the act. This, as well as the title, forms no part of the enacted law, and is meant merely as a declaration of the mischief intended to be remedied, sometimes pointing to the defects in the existing law, and the manner of the remedy.

§ 561. The preamble may be compared with the different clauses of the act, to collect the intention of the legislature, and where the intention is apparent, not to extend the act. The preamble may be used in restraint of the general enacting clause, where it would be inconvenient if not restrained, or it may be resorted to in explanation of the enacting clause, if it be doubtful.(*a*) In one case in England, the preamble of an act of parliament, reciting that certain outrages had been committed in particular parts of the kingdom, was adjudged by the court of king's bench to be admissible in evidence, for the purpose of proving an introductory averment in an indictment for a libel; that outrages of that description had existed, for the reason that where an act was passed, it was, in contemplation of law, the act of the whole body of the kingdom.(*b*)

§ 562. Although the preamble has been held to form no part of the statute or enactment,(*c*) yet in doubtful cases resort has been had to the preamble, as well as the title, for the purpose of discovering the inducement the legislature had to make the law, and the true intent and meaning of the legislature in its enactment.(*d*) But where the terms of an enacting clause are clear and unambiguous, neither the preamble nor any thing else

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(*a*) Per Buller, J., *Crespigny* v. *Wittenoom*, 4 T. R. 793. See also 4 Inst. 330; *Rex* v. *Marks*, 3 East R. 165; Harg. & Butler's Notes on Co. Litt. 70, *a*; *Mace* v. *Cammell*, Lofft, 783.

(*b*) *Rex* v. *Sutton*, 4 M. & S. 532.

(*c*) *Mills* v. *Wilkins*, 6 Mod. 62; 3 Scam. 465.

(*d*) *Edwards* v. *Pope*, 3 Scam. 465.

should be resorted to. It is said,(*a*) "That though the preamble be generally a key to the statute, yet it does not always open all parts of it; but sometimes the legislature, having a particular mischief in view, to prevent which was the first and immediate object of the statute, recite that in the preamble, and then go on in the body of the act to provide a remedy for general mischiefs of the same nature, but of different species, not expressed in the preamble, nor perhaps then in contemplation.

§ 563. Lord Coke considered the preamble of a statute as a key to open the understanding of the statute, and a good means of collecting the intention and showing the mischiefs which the makers of the act intended to remedy, and Lord Bacon has said that it is in general true that the preamble of a statute is a key to open the minds of the makers as to the mischiefs which were intended to be remedied by the statute, and was a maxim of the civilians "*cessante leges, proœmio cessat est ipsa lex.*" But it has been very justly said, if the preamble to a statute be a key to its construction, it is to be lamented that it so seldom states the real occasion of the law, and the views of the proposers of it; and every English lawyer is aware how seldom, at least in the older statute, the key unlocks the casket."

§ 564. It is nothing unusual in an act of parliament in England, or a statute in this country, for the enacting part to go beyond the preamble, and the remedy often extends beyond the particular act or mischief which suggested the necessity of the law; and it is not unfrequent that the preamble is merely introductory to the first section of the act, and has no application or reference to other sections or parts of the act.(*b*)

(*a*) *Mace* v. *Cammell*, Lofft, 782.

(*b*) *Holbrook* v. *Holbrook*, 1 Pick. 251.

§ 565. In the case of *The King* v. *Marks et al.*,(*a*) the defendant was committed under a warrant, charged with felony in aiding and assisting, and being present at and consenting to the administering and taking an oath or engagement to certain persons named, contrary to the statute 37 Geo. 3, c. 123. The preamble to the act only recited certain mischiefs which had arisen from persons attempting to seduce soldiers, sailors and others from their duty and allegiance to the king, and to incite them to mutiny and sedition, to give effect to which, they had imposed pretended oaths upon them. But the body of the act enacted, "That any person or persons who shall in any manner or form whatsoever administer, or cause to be administered, or be aiding or assisting at, or present at, or consenting to the administering or taking of any oath or engagement purporting or intending to bind the person taking the same, to engage in any mutinous or seditious purpose, or to disturb the public peace, or to be of any association, society or confederacy formed for any such purpose, or to obey the order or command of any committee or body of men not lawfully constituted, or of any leader, or commander, or other person not having authority by law for that purpose, or not to inform or give evidence against any associate, confederate or other persons, or not to reveal or discover any illegal oath done or to be done, or not to reveal or discover any engagement which may have been administered or tendered to, or whom by, such person or persons, or to, or by, any other person, or the import of any such oath or engagement, shall, on conviction by due course of law, be adjudged guilty of *felony*." A motion was made to bail the defendant, on the ground of the insufficiency of the warrant, and it was insisted that the words of the

(*a*) 3 East R. 165.

statute relied on, however large in themselves, must be confined to the object stated in the preamble, to wit, the administering of unlawful oaths for the purposes of mutiny or sedition. Lord Ellenborough said, that "the facts disclosed did charge the defendant with an offence within the statute. It certainly does appear, from the preamble of the act, as if it were mainly directed against combinations for purposes of mutiny and sedition, but there are words sufficient in the enacting part to satisfy the preamble, and after dealing with offences of that description, the act goes on in much more extensive terms, and embraces other more general objects; and as there is no word of reference in the latter part as *such*, which is to be found in the former part of the clause, I see no reason for restraining the common import of the words used, which extend to all illegal associations and combinations of men, in respect of which oaths of the nature described in the act are administered. From a view of the whole scope of the act, it appears to me highly probable that this is a case which will be found within the true spirit as well as the letter of it." Lord Hardwicke(*a*) says, "there are many cases where the enacting part of the statute extends further than the preamble even in criminal matters, as in an act made in 33 Hen. 8, c. 23, for trying treason and murders, where the words being within the *king's dominion* or *without* it, have been extended to trials in the West Indies, and persons have been tried and executed."

§ 566. Mr. Barrington, in his Treatise on Statutes, has shown in numerous instances, that a statute frequently recites what in truth is not the real occasion of the law, such as that doubts have arisen at common law, which frequently never had existed. It will readily be per-

(*a*) *Kinaston* v. *Clarke*, 2 Atk. 205.

ceived what great uncertainty there is, as to the accuracy of recitals contained in the preambles to statutes, and how little reliance can be placed upon those preambles in seeking out the intention of the legislature, and that the true meaning of a statute must generally be sought from the purview or body of the act. For it is undoubtedly true, that the preamble is never no more than a recital of some inconveniences or mischiefs, at which the act is levelled, which by no means excludes any other for which a remedy is given in the enacting part of the statute, and the rule is established authoritively, that where the words in the enacting part are strong enough to take in the mischief intended to be prevented, they should be extended for that purpose, although the preamble does not name the particular mischief.

§ 567. It is said, general words in the enacting part shall never be restrained by any words introducing that part; for it is no rule in the exposition of statutes to confine the general words of the enacting part to any particular words either introducing it, or to any such words even in the preamble itself.(*a*) It is true Lord Coke commends a construction which agrees with the preamble, but not such as may confine the enacting part to it. Lord Chancellor Cowper(*b*) says: "I can by no means allow of the notion, that the preamble shall restrain the operation of the enacting clause, because the preamble is too narrow or defective, therefore the enacting clause, which is in general words, shall be restrained in its full latitude, and from doing that good which the words would otherwise of themselves import," and he instanced, by way of illustrating the absurdity of a different rule, the Coventry act, 23 Car. 2, c. 1, which if it had

(*a*) *The King* v. *Athos*, 8 Mod. 144.
(*b*) *Copeman* v. *Gallant*, 1 P. Wm. R. 320.

recited the barbarity of cutting Coventry's nose, and the enacting clause had been general, viz. against the cutting of *any member* whereby the man is disfigured or defaced, it might with equal reason be objected, that cutting of the lips or putting out the eye would not have been within the act because not within the preamble.(*a*)

§ 568. But other cases have held, that the enacting clause may be restrained by the preamble, when no inconvenience will be sustained by such construction, otherwise not.(*b*) This seems rather an exception to the general rule. There is also another class of cases which are also exceptions to the general rule, and in which the converse of the above exception is also laid down, to wit, that if the not restraining the generality of the enacting clause will be attended with inconvenience, the preamble shall restrain it.(*c*) Lord Chief Baron Parker in *Ryall* v. *Rolle*,(*d*) says: "I admit, in many cases, the preamble will not restrain the general purview, as in 1 Jones, 163, Pal. 485, but it is a rule, and so agreed there, that where the not restraining the generality of the enacting clause will be attended with inconvenience it shall restrain, and here would be inconvenience if not restrained."

§ 569. Ch. J. Willes says,(*e*) "if the words of an act of parliament be doubtful, it may be proper to have recourse to the preamble, to find out the meaning of the legislature, but where the words of the enacting part are plain and express, I do not think that they ought to be restrained by the preamble, for the preamble may only

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(*a*) See also *Gaunt* v. *Brockman*, Hardin, 335.

(*b*) *Seidenbender* v. *Charles*, 4 S. & R. 166; *Kent* v. *Somerville*, 7 Gill & John. 266.

(*c*) *Ryall* v. *Rolle*, 1 Atk. 174.

(*d*) 1 Atk. 174, also reported in 1 Vesey, sen. 365.

(*e*) *Copeman* v. *Gallant*, 1 P. Wms. R. 320.

recite some particular mischiefs which have happened, but the enacting clause may not only be calculated to prevent those mischiefs but also others of a like nature."

§ 570. Mr. Justice Wild(*a*) says: "This is undoubtedly true, and might be demonstrated by reference to very many statutes, in which it will be found that the preamble states imperfectly the views of the legislature, and can afford but little aid in the construction of the enacting parts."

§ 571. Mr. Justice Thompson laid down the rule thus: "It is in general true, that the preamble of a statute is a key to open the mind as to the mischiefs which were intended to be remedied by the statute. This rule must not however be carried so far as to restrain the general words of the enacting clause." Although the preamble cannot control the enacting part of a statute, which is expressed in clear and unambiguous terms, yet if any doubt arises on the words of the enacting part, the preamble may be resorted to to explain it.(*b*) Parker, Ch. Justice,(*c*) lays down the rule, that it is right and proper to consider the whole of a statute and *preamble*, and the probable intention of the legislature, in order to ascertain the meaning of any particular section; and that this mode of interpretation is justifiable, even where the words of the section may be unambiguous. If one section, however explicit in its terms, if taken literally, would contravene the general object of the statute, it should be restrained so as to conform to that object. In a case where the question was, whether the act of 1784, cutting down estates tail, included such estates created by deed as well as by devise, it was held it did. Ch. J. Hornblower said, "they are within the title of the act,

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(*a*) *Holbrook* v. *Holbrook*, 1 Pick. 251.

(*b*) See also *Kent* v. *Somerville*, 7 Gill & John. 265.

(*c*) *Holbrook* v. *Holbrook*, 1 Pick. 257.

and though the *preamble* has a *different* aspect, and looks only to devises, yet the act itself is not to be restrained by that. It is, nevertheless, an appropriate preamble to two branches of the statute and not inconsistent with the third subject of its enactment. When a statute is in itself ambiguous and difficult of interpretation, the preamble may be resorted to, but not to create a doubt or uncertainty which otherwise does not exist."

§ 572. If the words of an enacting clause give a clear and definite remedy for the grievance recited in the preamble, their import cannot be enlarged so as to include another remedy, although the words of the preamble would seem intended to introduce a more extensive remedy. Thus although the statute 3 W. & M. c. 14, for relief of creditors against fraudulent devises, seems to allude to all specialty debts, and although the second section, in general terms, makes void wills of land, &c., against specialty creditors, yet as the specific remedy given by sec. 3, is an action of *debt* on such bonds and specialties against the heir and devisee; it was held, that an action of covenant would not lie against a devisee for a breach of covenant by the devisor, but that the remedy was confined to cases where debt lies.(*a*) This rule proceeds upon the principle, that general expressions may be restrained by subsequent particular words, which show that in the intention of the legislatere those general expressions are used in a particular sense, and that under this principle the latter words describing the remedy, imply a restriction on the general words which precede them.(*b*)

§ 573. In support of the general doctrine that the preamble of an act, though it may assist ambiguous words,

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(*a*) Bac. Abr. Statute, I.; *Wilson* v. *Knubley*, 7 East, 128.

(*b*) *Adams* v. *Wood*, 2 Cranch, 336.

cannot control a clear and express enactment, there are numerous decisions. Thus under the statute of England respecting legacies to subscribing witnesses to wills; the preamble of the statute states a doubt, which applied only to wills of land; who were to be deemed legal witnesses within the statute of frauds, and for the purpose of avoiding that doubt the statute was professedly made. But then, as the enacting part went beyond that object, and applied to witnesses attesting the execution not only of wills of real estate, but also of "any will or codicil," it was held, that as in these words, there was not any ambiguity, they clearly applied to every will and codicil. The preamble, although it might assist the construction of ambiguous words, could not control this clear and express enactment, and that the statute applied to wills of personalty also.(*a*) The true rule on this subject, deduced from all the authorities, is, that the preamble may be resorted to in restraint of the general words of the enacting clause, when it would be inconvenient when not thus restrained, or when no particular inconvenience would result from having it thus restrained. And the preamble may also be resorted to in explanation of the enacting clause, or as a key to its construction when the intent is doubtful; but it cannot control the enacting clause when expressed in clear and unambiguous terms.

§ 574. The true meaning of a statute is generally and most properly sought for and ascertained from the purview and body of the act;(*b*) that is in construing the words and collecting from them the intention of the legislature, regard must always be had to the subject-matter. As illustrative of the application of this rule,

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(*a*) *Lees* v. *Sammersgill*, 17 Ves. 510.

(*b*) *Strode* v. *The Stafford Justices*, 1 Brock. 162.

suppose a statute use the word *maintenance*, now this word, abstractedly considered, is in itself equivocal; but suppose we find the act in which it is used directed against the encouragement of litigation, and the upholding parties to suits, keeping in mind the purview of the act, we at once perceive what was designed to be prevented, or in other words, discover what was intended by the act. We have in another place stated the civil law rule on this subject, and cited instances illustrative of it.(*a*) The intent of the legislature is not to be collected from any particular expression in any one clause; but from a general view of the whole of an act; and if the court find in any particular clause an expression not so large and extensive in its import as those used in other parts of the act, and upon a view of the whole act it can collect from the more large and extensive expressions used in other parts the real intention of the legislature, it is their duty to give effect to the larger expressions.(*b*)

§ 575. Upon all acts of the legislature, such construction should be made as that one clause shall not frustrate and destroy, but on the contrary, shall explain and support another(*c*)—sound exposition requiring effect to be given to every significant clause, sentence or word in a statute. In one case where the question was whether a provision in an act was general, or related only to assaults on revenue officers, *qua* officers, Buller J. said: "The intention might be collected from other parts of the act. It is fair to infer that the legislature meant to extend the indemnity in the first section to all those cases in which, by the subsequent clause, they gave the right of changing the venue." In this instance, and in

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(*a*) See secs. 46[2], 480, 484, 485, 495.

(*b*) Per Best, J., 4 Bingh. 196; Dwarris, 703, 704.

(*c*) Hard. 344, pl. 1.

many others, prior clauses were allowed to be restrained by subsequent clauses in a statute. But where a clause which is separate and substantive itself creates an offence, the court may give judgment for that offence as a misdemeanor, notwithstanding there may be another section in the same statute giving a specific punishment.(*a*) This principle is illustrated in another place.

§ 576. In construing a doubtful clause in a statute, it will often be a question whether a clause be a substantive, independent clause, or only a qualification of an antecedent clause. It is difficult to lay down any precise general rule applicable to all such cases. Where, however, a section is by way of proviso, it can only be considered as a clause dependent on a former clause, unless the manifest intention of the legislature require a different construction.(*b*)

§ 577. A saving must be of a thing *in esse*. The nature of a saving is to preserve a former right, and not to give or create a new one. We have remarked in another place that it may restrain and qualify the purview, but was never allowed to overturn it.(*c*) When words are at the beginning of a sentence, they may govern the whole as *nullus liber homo*.(*d*) When words are at the end of a sentence, they refer to the whole.(*e*) Thus the words *per legem terræ*, in c. 29 of Magna Charta, being towards the end of the chapter, have always been held to refer to all the precedent matter.(*f*) But if words are in the middle of a sentence, and sensibly apply to a particular branch of it, can they be extended to that

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(*a*) *Rex* v. *Harris*, 4 T. R. 202. See *Rex* v. *Robinson*, 2 Burr. 799.
(*b*) 1 Stev. Elec. L. 23.
(*c*) 2 Inst. 32.
(*d*) In Mag. Char.
(*e*) 2 Inst. 50.
(*f*) 1 Stev. Elec. L. 21.

which follows? Agreeable to reason, and in grammatical construction, it should seem not; but as statutes are read without breaks and stops, it is not at any time clear that words belong to any particular branch of a sentence; it must be collected from the context to what they relate, and they are often to be read distributively —*reddendo singula singulis.*(*a*)

§ 578. A proviso is something engrafted upon a preceding enactment.(*b*) It was held by all the barons of the exchequer, that where the proviso of an act was directly repugnant to the purview of it, the proviso should stand and be held a repeal of the purview, because it was said it speaks the last intention of the lawgiver. It was compared to a will in which the latter part, if inconsistent with the former, supersedes and revokes it.(*c*)

§ 579. There is a known distinction in the law between an exception in the purview of an act and a proviso, which should be noted. If there be an exception in the enacting clause of a statute, it must be negatived in pleading; a separate proviso need not.(*d*) The rule is, that any man who will bring an action for a penalty on an act of parliament, must show himself entitled under the enacting clause; but if there be a subsequent exemption, that is a matter of defence, and the other party must show it to exempt him from the penalty.(*e*) Buller J. says: "I do not know of any case for a penalty on a statute, where there is an exception in the enacting clause, that the plaintiff must not show that the party whom he sues is not within it.(*f*) Lord Mansfield has

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(*a*) See Dwarris, 704; 1 Stev. Elec. L. 21.

(*b*) *Rex* v. *Taunton St. James*, 9 B. & C. 835.

(*c*) *The Attorney General* v. *Governor and Company of Chelsea Water Works*, Fitz. 195; Bac. Ab. Tit. Statute.

(*d*) Dwarris, 661.

(*e*) *Spiers* v. *Parker*, 1 T. R. 141; 8 T. R. 542.

(*f*) 8 T. R. 542.

said: "What comes by way of proviso in a statute must be insisted on, by way of defence, by the party accused; but where exceptions are in the enacting part of the law, it must appear in the charge that the defendant does not fall within any of them."(*a*)

§ 580. Where a statute delegates an authority to a particular person or to a particular class of persons, where it is evident that a personal trust or confidence is reposed in those persons, and especially where the exercise and application of the power is made subject to his or their discretion or judgment, the authority is purely personal, and cannot be delegated to another unless there be a special power of substitution. Such is the rule in relation to powers created by deed or will, *a fortiori* it is so, where the authority is conferred by an act of the legislature. It has accordingly been held that where authority was conferred upon the canal commissioners to enter upon and take the property of individuals for the construction of a canal, that this power could only be executed by them *in person* or under their *express directions;* and that an engineer, or any other subagent, could not lawfully exercise such power but by the express direction of the canal commissioners, or one of them, although such engineer had been entrusted with the superintendence of the construction of the canal in the vicinity.(*b*)

§ 581. The general rule is, that where a statute gives authority to one person expressly, all others are excluded.(*c*) This rule seems founded upon the principle that a special power is always to be construed strictly. Thus, where an act of parliament gave power to "two parties finally to hear and determine an offence," it is

(*a*) Fost. 430; East P. C. 167.
(*b*) *Lyon* v. *Jerome*, 26 Wend. R. 485. See also 11 Rep. 64.
(*c*) 11 Rep. 59, 64.

necessarily supposed that they shall be together, or, which is the same thing, that they shall hold a special session for that purpose. And the same construction obtains where they are to do any other judicial act, as to make an order of bastardy, or adjudge the settlement of a poor person. For it is unknown to the laws of England that two persons shall act as judges in the same cause, when at the same time one of them is in one part of the country and the other in another.(*a*)

§ 582. In this connection, we shall proceed to consider the construction which has been given to particular words, when used in a statute. First, we shall consider the rule that obtains under laws imposing duties on goods, or, in other words, revenue laws. As these acts are intended for practical use and application by men engaged in commerce, the language adopted by the legislature will be interpreted according to the commercial understanding of the terms used. Revenue and duty acts, it should be remarked, are not, in the sense of the law, penal acts, and are not therefore to be construed strictly, nor are they, on the other hand, acts in favor of private rights and liberty, and therefore to be construed with extraordinary liberality. They are to be construed according to the true import and meaning of their terms —and when the legislative intention is ascertained, that and that only is to guide in interpreting such laws. They are not to be strained to reach cases not within their terms, even if it should be conjectured that public policy might have reached certain cases; nor on the other hand are their terms to be strained so as to exclude cases clearly within them, simply because public feeling might dictate such an exclusion. In *Elliot* v. *Swarthout*,(*b*) a question arose under the act of 1832, which,

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(*a*) Burn's Justice Introduc. 24. (*b*) 10 Pet. R. 150.

after imposing a specific duty on a number of enumerated articles, the section under which the question arose concluded in these words: "And upon all merino shawls made of wool, or all other manufactures of wool, or of which wool is a component part, and on ready made clothing, fifty per centum ad valorem." A question was made whether worsted shawls with cotton borders, and worsted suspenders with cotton ends or straps, were manufactured of wool, or of which wool was a component part. It was admitted as a fact, that worsted was made out of wool by combing, but that it became thereby a distinct article, well known in commerce under the denomination of worsted. The court held, that laws imposing duties on importations of goods were intended for practical use and application by men engaged in commerce, and hence it had become a settled rule, in the interpretation of statutes of this description, to construe the language adopted by the legislature, and particularly in the denomination of articles, according to the commercial understanding of the terms used. That it being admitted in this case that worsted was a distinct article, well known in commerce under that denomination, they must understand Congress as using the term in that commercial sense, and as contradistinguished from wool and woolen goods, another well known denomination of goods. That the classification of the article in this section, showed that Congress had in view a class of goods known as worsted goods, as contradistinguished from wool, and upon which a different duty was laid; and they held that the shawls and suspenders were not a manufacture of wool, or of which wool was a component part.

§ 583. In the case of two hundred chest of tea,(*a*) it was held that the term "tea" was used in the duty act

(*a*) 9 Wheat. 430.

in its known commercial sense, and that *bohea tea* of commerce was not usually a distinct and simple substance, but was a compound made up in China; it came within the duty act under the general word "teas." The court in that case say: "The object of the duty law is to raise revenue, and for this purpose to class substances according to the general usage and denomination of trade. Whether a particular article was designated by one name or another in the country of its origin, or whether it were a simple or mixed substance, was of no importance in the view of the legislature. It applied its attention to the description of articles as they derived their appellation in our own markets, in our domestic as well as our foreign traffic; and it would have been as dangerous as useless to attempt any other classification than that derived from the actual business of human life.

§ 584. Under the revenue act of 1816, a duty is laid on "loaf sugar." In one case,(*a*) it was held that the words "loaf sugar" must be understood according to their general meaning in trade and commerce, and buying and selling. Mr. Justice Story, in that case, says, "That after all, acts of this nature are to be interpreted, not according to the abstract propriety of language, but according to the known usage of trade at home and abroad. If an article has one appellation abroad, and another at home, not with one class of citizens merely, whether merchants, or grocers, or manufacturers, but with the community at large, who are buyers and sellers, doubtless our laws are to be interpreted according to that domestic sense. But where a foreign name was well known here, and no different appellation exists in domestic use, we must presume that in a commercial law the legislature used the word in the foreign sense. I

(*a*) *United States* v. *Breed et al.* 1 Sumner, 159.

say nothing as to what rule ought to prevail where an article is known by one name among merchants, and by another among manufacturers, or the community at large, in interpreting the legislative meaning in a tariff act. Congress, under such circumstances, may, perhaps, be fairly presumed to use it in the more general or more usual sense, rather than in that which belongs to a single class of citizens. What then is meant by "loaf sugar" in a commercial sense, by which I mean not merely among merchants, but among buyers and sellers generally in the domestic trade? Has it any generally received uniform meaning? If it has, then that must be presumed to be the meaning adopted by the legislature. I agree to the law as laid down in the case of the two hundred chests of tea.(*a*) That case was fully considered, and as deliberately weighed as any which ever came before the court. It was there laid down, that in construing revenue laws, we were to consider the words not as used in their scientific or technical sense, where things were classified according to their scientific characters and properties, but as used in their known and common commercial sense in the foreign and domestic trade. Laws of this kind tax things by their common and usual denomination among the people, and not according to their denomination among naturalists, or botanists, or men of science."

§ 585. It has also been held, that it is a well settled rule of interpretation of laws of this sort, that articles grouped together are to be deemed to be of a kindred nature and of kindred materials, unless there is something in the context which repels that inference. That *noscitur a sociis* is a well founded maxim, applicable to revenue as well as penal laws.(*b*) That laws impo-

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(*a*) 9 Wheat. 430.

(*b*) *Adams* v. *Bancroft*, 3 Sum. 386.

sing duties are never construed beyond the natural import of the language, and duties are never imposed upon the citizen upon doubtful interpretation; and as every duty imposes a burthen on the public at large, and is construed strictly, and must be made out in a clear and determinate manner from the language used.(*a*)

§ 586. In the case of *The Schooner Nymph*,(*b*) a question arose as to the meaning of the word "trade" under the license law, respecting the carrying on business by vessels in certain trades. The vessel in question had been licensed to carry on the cod fishery, and the question was whether the trade of mackerel fishery could be carried on under such a license, the act having declared that the vessel should be forfeited in the event that any vessel should be employed in any other trade than that for which she was licensed. It was contended, on the part of the claimant, that the word "trade" was here used in its most restricted sense, and was equivalent to traffic in goods, or buying and selling in commerce or exchange. But it was held, that such was not the true sense. The word "trade" was often used, and indeed generally used in a trade sense, and as equivalent to occupation, employment or business, whether manual or mercantile. That whenever any occupation, employment or business was carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts, or in the learned professions, it is constantly called a trade. It was used in this sense when we speak of the art, mystery or trade of various mechanics whose trade was carried on without buying or selling goods. The words of this section showed that "trade" must mean something more than mere traffic in goods, or commercial buying and selling. The very language implied

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(*a*) *Adams* v. *Bancroft*, 3 Sum. 387.

(*b*) 1 Sumner, 516.

that the vessel was to be licensed for some trade, and that she might engage in another trade. The cases in which licenses were authorized or required were for vessels engaged in the coasting trade, or the whale fishery, or cod fishery, and that this section applied to each of them, and hence that each of them were contemplated as a "trade" in the sense of the act. The coasting trade was not ordinarily a traffic in buying and selling, but a transportation for hire. There was no more difficulty, in propriety of language, in denominating the whale fishery the whale trade, and the cod fishery the cod trade, than in denominating the coasting business the coasting trade. Each embraced the same general notion, to wit, employment, occupation, or business for gain alone, in contradistinction to employment for mere pleasure. That it seemed beyond all reasonable doubt that the whole policy of the act would be defeated, and its manifest intention be evaded, by any narrow definition of the word "trade," and hence it must be considered as used in the sense of occupation, employment, or business, and consequently mackerel fishery was a "trade" within the purview of the act.

§ 587. The words "high seas." The question has frequently arisen under the criminal statutes of the United States, as to the meaning of those words, when used in a statute; and for the ascertainment thereof resort has been had to the technical meaning of these terms at common law, and the same meaning has been attached to them as the words are understood at common law. Blackstone uses the words "high sea," and "main sea," *altum mare*, or *le haut meer*, as synonymous, and adds, "that the main sea begins at the low water mark." Mr. Justice Story seemed to be of the opinion, that though this might be one sense of the term, to distinguish the divided empire which the admiralty pos-

sessed between high water and low water mark, when it was full sea, from that which the common law possessed when it is ebb sea; yet that the more common sense was, to express the open uninclosed ocean, or that portion of the sea which is without the *fauces terræ*, or sea coast, in contradistinction to that which is surrounded or inclosed between the narrow head lands or promontories.(*a*)

§ 588. Lord Hale says: "The sea is either that which lies within the body of the country or without it. That arm or branch of the sea which lies within the *fauces terræ*, where a man may reasonably discern between shore and shore, is or *at least may be* within the body of a county, and therefore within the jurisdiction of the sheriff or coroner;" and he adds, "the part of the sea which lies not within the body of the county is called the main sea or ocean;" *de jure mari.*(*b*)

§ 589. Chief Justice Marshall,(*c*) seemed inclined to the same interpretation of the words "high seas," in our criminal code. He says: "The words are to be taken according to the common understanding of mankind; if they be taken in their received and popular sense, the "high seas," if not in all instances confined to *the ocean which washes a coast*, can never extend to a river half a mile wide in the interior of a country."

§ 590. It has been held,(*d*) that the words "high seas," used in the crimes statute of 1825, ch. 276, sec. 22, meant the uninclosed water of the ocean, or sea coast outside of the *fauces terræ*; and that where an arm of the sea, or creek, haven, basin or bay, was so narrow that a person standing on one shore could reasonably discern

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(*a*) *United States* v. *Grush*, 5 Mason, 298.
(*b*) Harg. Tract. ch. 4, p. 10.
(*c*) *United States* v. *Millberger*, 5 Wheat. 76 to 94.
(*d*) *United States* v. *Grush*, 5 Mason, 290.

and distinctly see by the naked eye what was doing on the opposite shore, the waters were within the body of a county, and not part of the "high sea."

§ 591. Lord Hale, following the exact definition given by the books of assizes, 22 Assizes, 93, says: "That is called an arm of the sea where the sea flows and reflows, and so far only as the sea flows and reflows." Both he and Lord Coke, constantly limit the "high seas" to those waters of the ocean which are without the boundary of any county. At the common law narrow arms of the sea are deemed to be within the boundary of some county of the realm. But the waters of the ocean, upon the open sea coasts, are admitted on all sides to be without the limits of any county, and are within the exclusive jurisdiction of the admiralty, up to the high water mark when the tide is full, and are deemed by the crown writers generally as the high sea or main sea. It has been held,(*a*) that an offence committed in a bay which was entirely land locked, and enclosed by reefs, was not committed on the high seas within the purview of the act of congress of 26th March, 1804, ch. 40. In the case of *The United States* v. *Ross*,(*b*) Story, J., held, that the words "high seas," within the true intent and meaning of the act of 30th April, 1790, ch. 9, sec. 8, meant any waters on the sea coast which are out of the boundaries of low water mark, although such waters might be in a roadstead or bay, within the jurisdictional limits of a foreign government. That such was the meaning attached to the phrase by the common law, and supported by the authority of the admiralty to a large extent.

§ 592. Under the statutes of Vermont, relating to *legal settlements*, a question arose as to the meaning of

(*a*) *United States* v. *Robinson*, 4 Mason, 307.
(*b*) 1 Gallis. 626.

the words "healthy and able bodied persons." It was insisted, that the health and physical ability of the pauper must be continued and uninterrupted; that these statutes were to be construed strictly. But it was held, that the health enjoyed by men of health, and the physical ability ordinarily possessed by men of sound bodies, constituted the "healthy and able bodied men," within the meaning of the act, and this, nothwithstanding there might have been a casual or temporary illness, or bodily unsoundness, producing an occasional and temporary effect upon the capacity to labor.(*a*)

§ 593. The terms "law of the land," have not unfrequently been used in bills of rights and other fundamental constitutions of a state. This phrase has been adopted from *Magna Charta*, and as the meaning of these words were well understood as used in that instrument, it has been held that they must be considered as used in the same sense in which they were therein used; and it has been held, that the words used in a state constitution, providing that "no subject should be arrested," &c., but by the law of the land, meant the same thing as due process of law; and that as an arrest, if authorized by a statute or common law, though without writ or warrant, has always been considered in England as warranted *per legum terræ*—by due process of law, within the meaning of Magna Charta;—an arrest under a statute, or the common law, must be considered an arrest by the law of the land, within the meaning of the constitution.(*b*)

§ 594. Mr. Justice Bronson,(*c*) commenting on the provision of the constitution of New York, which provides, "No member of this state shall be disfranchised

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(*a*) *The Town of Starskboro* v. *The Town of Hinesborough*, 15 Verm. R. 200.

(*b*) *Mayo* v. *Wilson*, 1 N. H. R. 55.

(*c*) *Taylor* v. *Porter*, 4 Hill R. 145.

or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers," says, "The words 'by the law of the land,' as here used, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense. The people would be made to say to the two houses, 'You shall be vested with the legislative power of the state, but no one shall be disfranchised, or be deprived of any of the rights or privileges of a citizen, unless you form a statute for that purpose,' in other words, 'you shall not do the wrong unless you choose to do it.'" The section was taken with some modifications from *Magna Charta*, which provided, that no freeman should be taken or imprisoned, or be disseised of his freehold, &c., but by the lawful judgment of his peers, or *by the law of the land.* Lord Coke, in his commentaries upon this statute, says, that "these words, 'by the law of the land,' mean by the due course and process of the law," which he afterwards explains to be "by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by writ original of the common law."(*a*) In North Carolina and Tennessee, where they have copied almost literally this part of the twenty-ninth chapter of *Magna Charta*, the terms "law of the land," have received the same construction.(*b*) "The meaning of the section there seems to be, that no member of the state shall be disfranchised or be deprived of any of his rights or privileges, unless the matter shall be adjudged against him upon trial had, according to the course of the common law. It must be ascertained ju-

(*a*) Inst. 45, 50.

(*b*) *Hoke* v. *Henderson*, 4 Dev. 1; *Jones* v. *Perry*, 10 Yerger, 59; 3 Story on Const. 661; 2 Kent's Com. 13.

dicially, that he has forfeited his privileges, or that some one else has superior title to the property he possesses, before either of them can be taken from him. It cannot be done by mere legislation."

§ 595. It is a general rule in the construction of statutes, that the word "may," in a public statute, is to be construed "must," in all cases where the legislature mean to impose a positive and absolute duty, and not merely to give a mere discretionary power, but no general rule can be laid down upon this subject, further than that exposition ought to be adopted in this, as in other cases, which will carry into effect the true intent and object of the legislature in the enactment. This principle was recognized in the case of *Minor* v. *The Mechanics Bank of Alexandria.*(*a*) The charter in that case provided, that the capital stock of the corporation *may* consist of $500,000, divided into shares, &c., and *shall* be paid in manner following:—that is to say, one dollar on each share at the time of subscribing, and one dollar on each share at sixty days, and one dollar on each share ninety days after subscribing, and the remainder to be called for as the president and directors *may* deem proper, &c. It was contended that "may," in this section, meant must. The court held that it did not; after stating the rule as above laid down, they held that the ordinary meaning of the language must be presumed to be intended, unless it would manifestly defeat the object of the provision. The court could not say that there was any leading object in this charter which would be defeated by construing the word "may" in its common sense, as importing a power to extend the capital stock to $500,000, and not an obligation that it should be that sum and none other. In answer to the argument, that

(*a*) 1 Peters R. 64.

public policy required such an imperative construction of the clause for the public security, it was held a sufficient answer, that no such public policy was avowed, nor could it be inferred from the general terms of the act. When the legislature intended to restrict the capital stock of a bank, or require any portion of stock in a stockholder to be indispensable to its legal existence, and operation, it was not uncommon to incorporate such a restriction in the charter. The omission to do so, was quite significant, that the legislature did not deem such a restriction subservient to any manifest public policy. The court could not perceive any clear legislative intention to make the subscription of the whole capital stock a condition precedent to the corporate existence of the bank.

§ 596. In another case,(*a*) one point presented was, whether the plaintiffs were bound by an act of the legislature, passed in 1815, to remove their gate from the Walkill bridge. The words of the act were, "That it *shall* and *may* be lawful for the president, directors, and company to remove the toll gate, &c." Chancellor Kent held, that the statute was not imperative, but that it left it at the discretion of the company to remove the gate or not, and he considered the true rule of construction applicable to statutes in such cases to be, that the word "may" means *must*, or *shall*, only in cases where the public interest and rights are concerned, and where the public or third persons have a claim *de jure* that the power should be exercised.

§ 597. In another case,(*b*) under a statute which provided, "That if any person hath died, or shall die, leaving several persons, his or her heirs, either in the same

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(*a*) *The Newburgh Turnpike Co.* v. *Miller*, 5 J. C. R. 112.
(*b*) *Malcom* v. *Rogers*, 5 Cow. R. 188.

degree or different degrees, all such heirs shall or *may* recover in one suit," &c., a question arose whether all such tenants in common were compelled to join in one action, and it was held that they were not, and the rule was recognized, that the words "shall," or "may," when used in a statute, were imperative only when the public interest and rights are concerned. But when a statute declared, that an individual, or individuals, *shall* or *may* do certain acts, or have a certain remedy, which is intended for his or their own benefit, he or they had a discretion to do the act or pursue the remedy or not. Sutherland, Justice, said "The statute was intended for the benefit and relief of the heirs, such is the scope and general character of its provisions, and the language used in this particular section, I am inclined to think, according to established principles of construction, leaves it discretionary with the heirs to bring joint or several actions, according to their own views of their own interest." After citing several cases where such words had been held imperative, and showing that in each of them the public or third persons had an interest in the act to be done, he adds: "In the case now under consideration, the public has no direct or immediate interest in the question, or, as Chancellor Kent expresses it, a claim *de jure*, to call upon the plaintiffs to exercise the authority given by the statute to sue jointly with his co-tenant. It is a power given for the benefit of the heirs, which they may exercise or not, at their discretion. It is permissive merely, and not compulsory."

§ 598. In the case of *The King* v. *The Bailiffs and Corporation of the Borough of Eyre*, a bye-law of the corporation directed that upon the happening of any vacancy in the number of twenty-four common council, such vacancies should be filled by the freemen inhabiting the town, and that a court should be holden once in every year, at which it "*shall* and *may*" be lawful for

the bailiffs to admit to the freedom of the city such persons as had been resident there for one whole year. On a motion for a mandamus to admit to the freedom of the town, one who had been a resident for the requisite period, it was held by Abbot, C. J., that the bye-law did not give to any person resident during the time therein mentioned an absolute right to be admitted to its freedom. That the words *shall* and *may* gave to the bailiffs a discretionary power to admit the person who had the qualification therein mentioned; but that it by no means made it imperative on them to do so. These cases are sufficient to illustrate the rule that the words *shall* or *may* are to be regarded as permissive merely, where the public or third persons have no interest in having them considered as imperative.

§ 599. On the other hand, there are numerous cases which clearly establish the converse of this proposition, and that the words "shall or may" are to be construed as imperative in all cases where a public body or officers have been clothed by statute to do an act which concerns the public interest or the rights of third persons, and that in such cases the execution of the power, or the doing of the thing required, may be insisted on as a duty, though the phraseology of the statute be permissive merely, and not peremptory. Indeed, this proposition is impliedly admitted in all the cases we have cited in support of our first proposition.

§ 600. In *Rex* v. *Barlow*,(*a*) it is said, that where a statute directs the doing of a thing for the sake of justice or the public good, the word "may" is the same as the word "shall." That was a case under the 14 Car. 2, ch. 12, which gave power and authority to the church wardens, &c., to make an assessment to reimburse the

(*a*) 2 Salk. 609.

constables; the statute was held to be imperative, and that for the reason that both the public and the constables had an interest in having the authority exercised. So, too, the statute of 23 H. 6, which says the sheriff *may* take bail, has been construed the same as though it said he *shall* take bail, and rests upon the same principle.

§ 601. In another case,(*a*) the trustees of a charity were directed, *as to the merchants*, if guilty of drunkenness or any debauchery, then they "*shall* and *may*," by writings under their hands and seals, turn them out. A question was made, whether those words were imperative. Lord Hardwicke held, that the words "*shall* and *may*," in general acts of parliaments, or in private constitutions, are to be construed imperatively. They must remove them. That under this general power of amotion, the founder had laid an obligation upon them to turn out for the *majora crimina*, if he might so call them.

§ 602. In *Backwell's case*,(*b*) the Lord Keeper declared, that though the words in the act of parliament under which an application for a commission in bankruptcy was made, were that the chancellor *may* grant it, yet that in such a case the word *may* was in effect *must*. In the case of *The King* v. *The Inhabitants of Derby*,(*c*) a motion was made to quash an indictment found against the inhabitants "for refusing to meet, and make a vote, to pay the constable's tax. The ground for the motion was, that the statute was not imperative, but merely they "*may* meet," &c. The court, however, held *may*, in the case of a public officer, was tantamount to *shall*.

(*a*) *Attorney General* v. *Lock*, 3 Atk. R. 164.
(*b*) 1 Vernon, 152.
(*c*) Skinner, 370.

§ 603. In a case in the courts of New York,(*a*) it was held, that the act to reduce several laws relating particularly to the city of New York into one act, and in which it was provided that "it *shall* and *may* be lawful for the mayor and aldermen, &c., to cause certain acts to be done relative to sewers and drains, &c., was a statute of public concern, and related exclusively to the public welfare, and that the words "*shall* and *may*," although permissive merely in their terms, must be regarded as peremptory on the corporation. That when the public interest called for the execution of the power thus conferred, the corporation were not at liberty arbitrarily to withhold it. The exercise of the power became a duty which the corporation were bound to fulfil. Nelson, Ch. J., after citing several cases in support of this principle, says: "The inference deducible from the various cases on this subject seems to be, that where a public body or officer has been clothed by a statute with power to do an act which concerns the public interest or the rights of third persons, the execution of the power may be insisted upon as a duty, though the phraseology of the statute be permissive merely, and not peremptory.

§ 604. The rule laid down in *The King* v. *The Mayor, &c. of Hastings*,(*b*) is, that if there are words of permission in an act of parliament or charter which are for the public good or benefit, they are held to be obligatory. In that case, the charter provided that the mayor, &c. might, for the future, hereafter have and hold, and have power to have and hold, at some convenient place, one court, &c. It was held, that this permissive language was imperative, and that on the ground that the court was evidently intended for the benefit of the inhabitants, and was calculated to promote their benefit.

(*a*) 3 Hill R. 612. (*b*) 1 Dowl. & Ryl. 148.

It might be for their benefit that there should be a jurisdiction conducted according to the ancient common law of the country. The numerous cases which we have cited on this point clearly define and sufficiently illustrate the rule itself, and clearly indicate the circumstances, as well as the cases in which it is to be adopted and applied.

§ 605. The word "month," when used in a statute, has in several cases been held to mean a lunar month of twenty-eight days. In *Lacon* v. *Hooper*,(*a*) it was laid down as a general rule, that when the word month is used in a statute, without the addition of calendar or any other words to show that the legislature intended calendar months, it is understood to mean a lunar month; and this rule has been followed in other cases.(*b*)

§ 606. In the state of New York, however, this rule has been changed by statute, and it is expressly declared that the term *month* shall be construed to mean calendar month in all *statutes*, deeds and contracts, unless otherwise expressed.(*c*) Even before this statutory provision, it had been held that calendar, and not lunar months, would be intended to have been meant; when in the same act, and in reference to the same subject-matter, calendar time as years, months and weeks were spoken of.(*d*) The statute under which the question in the last case cited arose, allowed the owner of land two years from the time of sale in which to redeem the land, and required of the corporation to give public notice, six months before the expiration of the two years, four weeks; and the decision was placed upon the ground, that as calen-

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(*a*) 6 T. R. 226.

(*b*) *Jackson* v. *Clark*, 7 J. R. 217; *Loring* v. *Holling*, 15 J. R. 119; *Leffingwell et al.* v. *White*, 1 J. C. 99; *Parsons* v. *Chamberlain*, 4 Wend. 512.

(*c*) 1 R. S. 606.

(*d*) *The People ex rel. Moulton* v. *The Mayor, &c. of New York*, 10 W. 393.

dar time had been used by the legislature in fixing the period for redemption, it was a just and reasonable inference that they intended to use it in that sense, in fixing upon the division or period of time specifying the notice to be given to the owners to redeem. That as the one period in express terms was *calendar time*, and the six months immediately succeeded it, and was intended to include part of it, it should be construed to mean the same—otherwise it must be believed that the legislature intended to fix the different periods by different calculations of time in the same breath, and in the same subject-matter, and that without any conceivable purpose. The same rule also prevailed in another case,(*a*) and upon the same general principles. These cases clearly fall within the exception to the general rule—that is, that it does not obtain where, from the language of the act, the legislature evidently intended calendar, and not lunar months. In Massachusetts and Pennsylvania the rule obtains, that the word "month," mentioned generally in a statute or contract, will be considered as calendar month.(*b*)

§ 607. The relative word "*aforesaid*" often refers and restricts a clause to the preceding purview.(*c*) Being a collective word, it may have reference, according to the intent, to two or three several matters, as to "every term named in an indenture,"(*d*) unless where it is impossible to extend to other things, held in distinct right and under different titles.(*e*)

§ 608. The conjunction "and" couples sentences to-

(*a*) *Snyder* v. *Warren*, 2 Cow. 518.

(*b*) *Hunt* v. *Holden*, 2 Mass. 170; *Avery* v. *Pixley*, 4 Mass. 460; *Churchill* v. *Merchants Bank*, 19 Pick. 532; *Brudenell* v. *Vaux*, 2 Dall. 302; *Commonwealth* v. *Chambre*, 4 Dall. 144; *Moore* v. *Houston*, 3 S. & R. 184.

(*c*) 10 Rep. 139.

(*d*) Ibid. 107.

(*e*) 9 Rep. 47.

gether, so that former adverbs refer to all the verbs subsequent; in this way preventing repetition and tautology. Thus, in an objection taken upon the words "and then and there gave the said Edward a mortal wound," that it was not stated that he gave it "feloniously and of malice aforethought." The allegation was held sufficient, these words having been before mentioned.(*a*) But "and" is relative, as well as copulative. Thus, where R. devised one hundred sheep *and* ten bullocks, *and* ten pounds quarterly, the second "and" in the sentence disjoins and severs the rent from the sheep and the bullocks.(*b*)

§ 609. *And* is not always to be taken conjunctively. It is sometimes in the fair and rational construction of a statute to be read as if it were *or*, and taken disjunctively and distributively. Doderidge, Justice, says: "When the sense is the same, they are all one, and the words, conjunctive and disjunctive, are to be taken *promiscue*.(*c*) Thus, the conjunctive recited in a declaration, instead of the disjunctive, where the recital answers the sense of the statute, is sufficient; for the statute, notwithstanding the variance, is truly recited; nor, according to one case, will the use of the word *and* instead of *or* hurt, if the word *or* in the statute has always been construed *and*.(*d*)

§ 610. But where a statute uses the disjunctive *or*, in which sense it is to be understood, and the plaintiff in his declaration mis-recites the statute and uses the word *and*, and the recital in the declaration not answering the sense of the statute, all the authorities agree that the

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(*a*) 4 Rep. 40.

(*b*) 8 Rep. 85.

(*c*) *Creswick* v. *Rokesby*, 2 Bulstr. 47; see also 2 Hawk. c. 25, sec. 102, and *Waterhouse* v. *Keen*, 4 B. & C. 200.

(*d*) *Holt* v. *Gaven*, 2 Vent. 205; Cro. Eliz. 307.

declaration is bad.(*a*) Our courts have held that the word *or* has sometimes been construed to mean *and*, such construction being clearly necessary to give effect to a clause in a will, or to some legislative provision, but never to change or control at pleasure.(*b*)

§ 611. "All"—*qui omne dicit nihil excludit; generale dictum generaliter est intelligendum.* Therefore where a statute says, *omnes viduæ*, and there are five kinds of dower, that particular chapter does not extend to all of them.(*c*) Where the words "any thing in this act to the contrary notwithstanding" are used in a statute, it is equivalent to saying, that the act shall be no impediment to the measure. They are in consonance with the words adopted in the statute of uses, 27 Hen. VIII. c. 10, "as if this act had not been made.(*d*)

§ 612. Where a statute, in speaking of a suit, uses the word "*depending*," courts in construing it will not consider an action to be depending, if commenced by writ, until the process is returned. But, after an original writ is returned, then it is said it will be considered as pending, from the day of the test of the writ.(*e*) And in this State where, under the Revised Statutes, a suit may be commenced by the filing and service of a declaration, and action would not be deemed pending, until the actual service of the declaration on the party defendant.

§ 613. The word *empowered*, where the authority emanates from a superior, is considered as imperative.(*f*) The words, *from henceforth*, (*de cætero*) it is said, do not necessarily imply a new law. This was exemplified by

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(*a*) 1 S. Elec. L. 26.
(*b*) *Douglass* v. *Eyre*, Gilpin's D. C. R. 148.
(*c*) 2 Inst. 81, Stat. Merton, c. 2.
(*d*) 7 Rep. 2, 20.
(*e*) 5 Rep. 47, 48; 7 Rep. 30.
(*f*) S. Elec. L. 26.

the doubts which arose on the statute of Merton, c. 2.(*a*) The word *having*, under the statute of wills, imports two things, ownership, and time of ownership. Thus in *Butler's case*, as to the "power of a devisor to devise a manor," of divers notable reasons for the judgment, one was on the word *having*. It was said, if it be asked who can give and dispose by his last will in writing, &c.? The makers of the act answer, "every person having manors;" so that it is not said every person generally, but every person "having," &c. And this word *having*, imports two things, *silicet*, ownership, and the time of ownership, for he ought to have the land at the time of making his will, and the statute gives such person "having," &c., authority to devise it.(*b*)

§ 614. The words "fit person," in a statute, when used to designate a person fit to execute an office, means he—*qui melius et sciat et possit officium illud intendere*. Lord Coke says, "This word *idoneus* is oftentimes in law attributed to those who have an office or function, and he is said in law to be *idoneus*, apt and fit to execute his office, who has three things,—honesty, knowledge, and ability;—honesty to execute it truly, without malice, affection, or partiality: knowledge, to know what he ought duly to do; and ability, as well in estate as in body, that he may intend and execute his office when need is, diligently, and not for impotency or poverty to neglect it. It is upon this principle the doctrine obtains, that if a coroner in England be *senio confractus aut morbo paralysis percussus, aut terras et tenementa in eodem comitatu non habet, &c.*, so as to be *minus idoneus ad officium illud exequendum, &c.*, it is good to remove him.(*c*)

§ 615. The words *immediately maintenant*, applied to a descent of lands, as where a statute speaks of a descent

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(*a*) 1 S. Elec. L. 26.
(*b*) Ibid.
(*c*) Id. 27.

immediately after the decease, is equivalent to saying, without any mesne time, or mesne estate. Hence it is, that he who is immediate heir excludes all mesne heirs; and the same rule obtains in reference to an immediate tenant. A manor does not descend immediately where it is expectant on the refusal or disagreement of the widow, for, peradventure, she will not refuse in a year. Littleton says, that "if a woman disseisoress take a husband, and hath issue, and dies, and afterwards the tenant by the courtesy dies, this dying seised shall not toll the entry; for the issue came not to the lands *immediately* after the death of his mother."(*a*) In other cases the word *immediately* has not received such a strict construction, that a thing ought not to be made *in ipso articulo temporis*, but it is satisfied if the thing be made in convenient time. Thus, where a man is to make an obligation immediately after an award, he ought to have such time as the doing of the act requires, and then of necessity there ought to be a mean time between the award and the performance of the act.(*b*) So it is presumed that the word *instantur*, under the rules of our courts, would be held to mean within twenty-four hours. The words *likewise* and *in like manner* so couple a clause or section by a reference to a former clause or section, as to carry on its sense and extend its operation.(*c*)

§ 616. We shall in the next place, consider the rule that prevails in reference to the computation of statute time. First, where the computation of time in a statute is to be *from an act done*, the first day shall be excluded. Thus, our courts have held, under the statute prescribing the time within which an appeal should be brought

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(*a*) 1 S. L. Elec. 27.

(*b*) See *Butler and Baker's case*, 3 Rep. 34.

(*c*) *Rex* v. *Loxdale*, 1 Burr. 447.

from a justice's court, the first day was to be excluded.(*a*) Although in this case the court placed their decision not upon this general rule of construction, but upon the particular words of the statute, which showed an evident intent to exclude the first day.

§ 617. In *Homan* v. *Siswell*(*b*) the rule obtained, that where computation of time in a statute was to be from the date, or from an act done, the day of the date or act was exclusive. The question in that case arose under the act relative to the return of justices' executions. The court cited and relied on the case of *Ex parte Dean*, and the same rule was also adopted in relation to the redemption act,(*c*) also under the act of 1840,(*d*) providing that a *fi. fa.* cannot be issued until after the expiration of thirty days from the entry of the judgment, it has been held that the day on which the judgment was rendered was to be excluded from the computation.(*e*) So too under the statute requiring fourteen days notice of trial to be given, before the first day of the court, it has been held, that the first day of the court must be excluded from the computation.(*f*)

§ 618. We are not aware that the precise question has ever been presented to the court in this state, whether under our statute of limitations, the day on which the right of action accrued is to be excluded in the computation of time. It was however held in *Fairbanks* v. *Wood*,(*g*) that the day on which the revised statutes took effect was to be excluded in the calculation of the

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(*a*) *Ex parte Dean*, 2 Cow. 606.
(*b*) 6 Cow. R. 659.
(*c*) 2 Cow. R. 518.
(*d*) Sess. L. 1840, p. 334, sec. 24.
(*e*) *The Commercial Bank of Oswego* v. *Ives*, 2 Hill, 356.
(*f*) *The Columbia Turnpike Road* v. *Haywood*, 10 Wend. 422.
(*g*) 17 Wend. 329.

six years. There is but little doubt, but that upon the principle that has prevailed in our courts, in this state it will be held, under our statutes of limitation, that the day upon which the right of action accrued must be excluded from the computation of time, however the rule may be elsewhere. In *Wilcox* v. *Wood*,(*a*) Chief Justice Savage says, "In this state, on questions of the computation of time arising under our own rules and statutes, and upon promissory notes, we hold that the day of the date is excluded." The rule which obtains on this question is not uniformly the same in all the states, or in all the cases in England. In this state, however, the question is settled according to the rule above laid down.(*b*) Mr. Chitty thinks that the rule which has been adopted in New York, is at the present time the prevailing doctrine in England. Speaking of a statute containing phrases "after a certain time," he says, that "in construing the 2d W. & M. sess. 1, c. 5, authorizing a landlord to sell a distress, 'after such distress and notice as aforesaid, and the *expiration* of the said *five days*,' the day of the making of the distress is to be excluded, and after allowing the five following clear days, the sale should not be until the seventh day.(*c*)

§ 619. The other rules which obtain in the construction of statutes will be treated of and illustrated in subse-

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(*a*) 9 Wend. R. 348.

(*b*) *The Commercial Bank of Oswego* v. *Ives*, 2 Hill R. 355. See on this point *The Portland Bank* v. *The Maine Bank*, 11 Mass. R. 204; *Presbrey* v. *Williams*, 15 Mass. R. 193; *Bigelow* v. *Wilson*, 1 Pick. R. 485; *Commonwealth* v. *Keniston*, 5 Pick. R. 520; *Hampton* v. *Erenzeller*, 2 Browne's R. 18; *Ryman* v. *Clark*, 4 Blackf. R. 329; *Jacobs* v. *Graham*, 1 Blackf. R. 392; *Arnold* v. *The United States*, 9 Cranch, 104; *Pierpont* v. *Graham*, 4 Wash. C. C. R. 232; 3 Chitty's Genl. Practice, 108 to 110; 1 Cowen's Tr. 262, 263, 2d ed.; 2 Bouvier's Law Dict. 439, tit. Time.

(*c*) 3 Chitty's Gen. Pr. 109.; *Pitt* v. *Skew et al.*, 4 Barn. & Ald. 208. See note by Mr. Hill, 2 Hill's R. 356.

quent chapters, under the heads, "Of Contemporaneous Exposition," "Of statutes in pari materia," "Of affirmative and negative statutes," "Of equitable construction of statutes," "Of the equitable construction of penal statutes," "Of the construction of penal statutes," "Of the repeal of statutes," "Of public and private statutes," "Of the proof of the existence of statutes." In each of those chapters the reader will find many of the preceding rules again referred to, and the same exemplified and illustrated in their application to particular cases.

CHAPTER XIII.

OF CONTEMPORANEOUS EXPOSITION.

§ 620. For the purpose of ascertaining the intention of the legislature, and for putting a construction on a statute, resort in some cases may be had to *contemporaneous exposition*. Lord Coke has laid down the rule, that great regard, in the exposition of statutes, ought to be paid to the construction that sages of the law, who lived about the time, or soon after it was made, put upon it; because they were best able to judge of the intention of the makers when the law was made, regard being first had to the true import and meaning of the words themselves. It is undoubtedly true, in cases of doubt as to the intent, recourse should be had to the old authors who wrote at the time, or soon after the passing of the law. This rule is founded on the presumption that they must have had the fittest opportunity, and are the most likely to understand the circumstances which led to its enactment; and, hence, what was the intent and meaning of the law-makers. It is apprehended that the degree of light which contemporaneous exposition will throw upon a statute, or the weight of influence it should have upon the mind, must depend very much upon the agreement of such expositors, as to the cause which moved to the enactment of a particular statute, and the object which it had in view, and from which the intent is to be spelt out, and that such resort should never be had, except in doubtful cases, or where the words of the statute are obscure. In such cases, considerable stress will

be laid upon the light in which it was received and held by the contemporary members of the profession.

§ 621. In this case, as in all other cases, the object of such a resort is to ascertain the intention of the legislature, and to carry into effect their true intent and meaning, according to the spirit of the enactment; and, as such intent may be collected from various sources of information, foreign circumstances may be considered as evidences of the reason, cause, necessity, object and spirit of the law.(*a*) Resort may also be had, in cases of doubt, to the history and situation of the country, which sometimes will shed some light on the meaning of some of the provisions of an act.

§ 622. So, too, the history of the legislation in the state, in reference to the subject-matter of a particular statute, may be referred to, as tending to aid in the construction to be given to a statute.(*b*) Contemporaneous practice, which, as we have seen, consists in what was usually done in the place where the law was made, at or near the time of making it, is a circumstance so intimately connected with a law, that it will many times be taken into consideration, and influence the construction.

§ 623. *McKeen* v. *Delancy's Lessees*(*c*) affords a familiar illustration of this rule. The question in that case arose under the Act of Pennsylvania of 1715, which required deeds to be acknowledged before a justice of the peace of the county where the land lay; and it had been the long established practice, before 1775, to acknowledge deeds before a judge of the supreme court of Pennsylvania. Although the act of 1715 did not authorize such a practice, yet as the practice had prevailed, it

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(*a*) 4 Gill & J. 6.

(*b*) *Henry* v. *Tilson*, 17 Verm. R. 479.

(*c*) 5 Cranch Rep. 22.

was held that it must be considered as a correct exposition of the statute; that long and uninterrupted practice under a statute was good evidence of such construction. In *Stuart* v. *Laird*,(*a*) it was also held that a contemporary exposition of the constitution of the United States, *practiced* and acquiesced in for a period of years, commencing with the organization of the judicial system, fixed the construction. It was a contemporary interpretation of the most forcible nature; and such a *practical* exposition was too strong and obstinate to be shaken or controlled. Ch. J. Vaughan, in one case,(*b*) held, that when the meaning of a statute is dubious, long usage is a just medium to expound it by; for *jus et norma loquendi* are governed by usage. The meaning of things spoken or written must be, as it hath been constantly received to be, taken from common acceptation.

§ 624. There are two sorts of contemporary practice, and either of them may be applied for the purpose of explaining any ambiguous words or expressions in a statute. The first is the common practice, which prevailed among the people when the law was made. The second consists in what was done upon the law, in the time immediately after the making of it. From the practice which prevailed among the people at the time the law was made, we may, with some degree of probability, collect with what view it was made; what good the legislature designed to advance or secure, or what harm it designed to prevent or restrain. But this sort of contemporary practice, since this is the only use that can be made of it in interpreting laws, is only a remote means of interpretation; it helps us in our conjectures about the meaning of the law, and then from the reason of the law we ascertain the meaning of the legislature in any am-

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(*a*) 1 Cranch R. 299.

(*b*) *Sheppard* v. *Griswold*, Vaugh. R. 169; cited 1 Kent, 465.

biguous words or expressions that it has made use of. By what has been done upon a law soon after it was made, is not meant what has been done by courts of judicature, who are the authorized interpreters of the laws of the country. But the practice which it produced among the people, or what was done in consequence of it by those who were obliged, and might be supposed willing, to comply with it. The practice of courts or their determination of any question which has arisen upon a law, instead of being means which will help to interpret it, are themselves authentic interpretations of it. Thus far indeed the practice of such courts might be considered as evidence, but not as a means of interpretation.

§ 625. Though the persons, who for the time being preside in later times, may have the same authority to interpret a law, yet what their predecessors have done, who were contemporaneous with the legislature, will help to restrain them in the use of their authority, because it will show them in what sense the law was understood by those who had the best opportunity of knowing its true sense, either from the legislators themselves, or by seeing the situation of things which led to the making of the law. In like manner the effect which the law produced in the behavior of those who were obliged by it, and who lived at the time of making it, will help to form a judgment about the meaning of the legislature, when the words used have left that meaning doubtful, both because they had an opportunity either of finding out the reason of the law by their own observation, or of hearing it in their discourse with others, and because it is probable that if their practice had not been agreeable to the sense of the legislature, care would have been taken to correct it, or to explain its meaning more precisely.(*a*)

(*a*) See Ruth. b. 2, ch. 7, sec. 8, 9.

§ 626. Although general usage, under an act where the words are doubtful, may be called in to explain it; yet where they are clear, it is said the usage of a particular case cannot control them.(*a*) So, too, in the construction of a statute, great deference is certainly due to a legislative exposition of a constitutional provision, especially when it was made almost contemporaneously with such constitutional provision, and may be supposed to result from the same views of policy and mode of reasoning which prevailed among the framers of the instrument expounded.(*b*) Although in cases of real doubt as to the meaning of a particular clause in the constitution, a legislative construction, if deliberately given, is entitled to much weight, yet it is by no means conclusive on the judicial tribunals.(*c*)

§ 627. We have already shown, it is obvious that contemporary interpretation of a constitutional provision must be resorted to with much qualification and reserve. The private interpretation of any particular man or body of men must be manifestly open to much observation. Contemporary construction is properly resorted to, to *illustrate* and confirm the text, to explain a *doubtful phrase*, or to expound an *obscure clause*, and in proportion to the uniformity of that construction, and the known ability and talents of those by whom it is given, is that credit to which it is entitled. It can never *narrow down its true meaning*, it can never *enlarge the national boundaries.* Such, we have seen, was the opinion of Mr. Justice Story. Other able judges have held, that while great deference is due to a legislative exposition of a constitutional provision, when it is made contemporaneously with such constitution, and may be supposed to result

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(*a*) *Rex* v. *Hogg*, 1 T. R. 728.
(*b*) *The People* v. *Green*, 2 Wendell's Rep. 274.
(*c*) *Coutent* v. *The People*, 11 Wend. Rep. 513.

from the same views, and policy, and mode of reasoning, that even then it is by no means conclusive.

§ 628. To give much weight to a construction, by this department of the government, of its *own power*, and allow its own construction to *control*, would be a dangerous doctrine, as it would lead to dangerous consequences. The extent of the doctrine to be deduced from all the authorities on this point is, that a *practical exposition*, in order to be of much force, or entitled to much weight, must be one where there has been an unbroken chain of practice or precedent commensurate with the adoption of the constitution or particular statute, and acquiesced in and acted upon since that time.(*a*) It is otherwise, however, in regard to judicial construction of a statute or constitution, for much respect has always been paid to the contemporaneous construction of statutes, and a forbidding caution has always accompanied any approach toward unsettling it, dictated, no doubt, by easily foreseen consequences attending the sudden change of a rule of property, necessarily introductory, at least of confusion, increased litigation, and the disturbance of the peace of society.(*b*)

§ 629. The most able judges, and the greatest names on the bench, have held this view of the subject, and occasionally expressed themselves to that effect, either tacitly or openly, intimating that if they had held a part in the first construction, they would have been of a different opinion, but the particular construction having been made they gave their assent thereto. Lord Eldon in one case remarks; "I think it better to abide by that determination than to introduce uncertainty into this branch of the law, it being often more important to have

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(*a*) See ante, sec. 289, 290, 291, 292, 293, 294, 295.

(*b*) *Nelson* v. *Allen & Harris*, 1 Yerger, 376.

the rule settled than to determine what it shall be; I am not, however, convinced by the reasoning in this case, and if the point were new I should think otherwise."(*a*) Lord Mansfield in another case says: "When solemn determinations, acquiesced under, have settled precise cases, and a rule of property, they ought for the sake of certainty to be observed, as if they had originally formed a part of the text of the statute."(*b*) Sir James Mansfield says: "I do not know how to distinguish this from the case before decided in this court. It is of greater consequence that the laws should be as uniform as possible, than that the equitable claim of an individual should be attended to."(*c*) Judge Whyte says: "Whatever might be my own opinion upon this question, not to assent to its settlement now after two solemn decisions of this court, the last made upwards of fourteen years ago, and not only no opposing decision, but no attempt even by any case, during all this time, to call the point again into controversy, forming a complete acquiescence, would be at the least inconsistent, perhaps, and uncalled for by a correct discharge of official duty."(*d*) There also exists what may be regarded as judicial comity between the judicial tribunals of different countries or states, in putting a construction upon the local laws or statutes of another, to follow the construction which has been put on such statutes or laws by the judicial tribunals of the country or state in which the law was enacted. This rule is most generally founded upon the principle supposed to be universally recognized, where such department exist, that it is the appropriate organ for con-

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(*a*) *The King* v. *The Inhabitants of Eccleston*, 2 East R. 302.
(*b*) 1 Burrow. 419.
(*c*) 4 Bos. & Pul. 69.
(*d*) *Nelson* v. *Allen & Harris*, 1 Yerger, 376.

struing the legislative acts of that government. It is presumed that no court would presume to say that the courts of a country have misunderstood their own statutes, and therefore erect itself into a tribunal to correct such misunderstanding.(*a*)

§ 630. Under the peculiar form of government existing in the United States, there is another reason for the adoption of this rule as between the federal courts and the judicial tribunals of the different states, or between the judicial tribunals of different states. That is from the necessity of the case, to avoid a conflict of construction between the several tribunals. The federal courts in construing the statutes of any one of the states, have universally adopted the construction which has been put upon the statute by the judiciary of that state. Not because those decisions are final and conclusive in the federal courts, but because a fixed and received construction by a state in its own courts make a part of the statute laws.(*b*) It has with great propriety been asked, if the construction of the highest judicial tribunal of a state, forms a part of the statute law as much as an enactment of the legislature, how can a federal court make a distinction between them? There could be no hesitation in so modifying decisions to conform to any legislative alteration in a statute, and why should not the same rule apply where the judicial branch of the state government, in the exercise of its acknowledged functions, have by construction given a different effect to a statute from what had at first been given to it. That the charge of inconsistency might be made with much more force and propriety against the federal tribunals for a disregard of this rule than for a conformity to it. They profess to

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(*a*) *Elemdorf* v. *Taylor*, 12 Wheat. R. 152.
(*b*) 6 Pet. R. 291; 11 Wheat. R. 361.

be bound by the local law, and yet, if they were to depart from this rule, they would reject the exposition of that law which forms a part of it. This holds true, although a different constuction might have been formerly given; for the inquiry reduces itself to the question, what was the settled law at the time the decision was made, as this constitutes the rule of property within the state by which the right of litigant parties should be determined.(*a*) That it would be a strange perversion of principle if the judicial exposition of these laws were to be disregarded.

§ 631. Such is the regard of the federal courts for the exposition of the acts of the several legislatures by the state tribunals, that it is always with a great degree of reluctance they break the way in exposition of such statutes, and will not do so unless it becomes really necessary for the decision of a cause before them.(*b*) The importance of this rule will be manifest when it is considered that a great majority of cases which come before the federal tribunals, are cases where the courts are called upon to enforce the laws of the state. The rule that the courts will adopt the construction put upon a statute by the judicial tribunal of the country where the law originated, perhaps would not prevail in the case of a statute which originated in England and had received a construction there, and which statute has been adopted by any of the states. In such case the rule may be subject to some modification, for, by their adoption they become as entirely their own as if they had been originally enacted by the legislature of a state.(*c*) If the federal courts ever change their decisions it is because the

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(*a*) 11 Wheat. R. 361.
(*b*) 1 Brock. C. C. Rep. 539.
(*c*) 5 Pet. R. 264.

rule on which the decision was founded has been changed.(*a*)

§ 632. They also carry this principle of comity so far as to adopt the local laws of real property as ascertained by the decisions of state courts, whether those decisions are grounded on the construction of a statute of the state, or form a part of the unwritten law which has become a fixed rule of property.(*b*) Although this branch of the rule does not, strictly speaking, fall within the general object and scope of this work, it is deemed advisable to allude to and illustrate its application, and the reasons upon which it is founded, in this connection. The case of *Jackson* v. *Chew*(*c*) will serve as an illustration of the application of the rule, and the general principles upon which it is grounded. The question involved in that case was, whether certain words used in a will of one Medcef Eden were words of limitation, or whether the devisee under the will took an estate in fee, or an estate in tail under the will. The statutes of New York having abolished estates tail, the supreme court and the court for the correction of errors in that state had decided repeatedly that the clause in question in the will did not create an estate in tail, but was to take effect as an executory devise. It was urged on the argument in this cause, that the principle of adopting the construction of state courts only applied to the construction of statutes. But it was held that the rule had been extended to other cases, and that there could be no good reason assigned for not applying it as well to the rules of construction growing out of the common law as

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(*a*) See also 1 Pet. R. 64; *Minor* v. *Bank of Alexandria*, 2 id. 18, 85, 349, 368, 662, 664; 3 id. 65, 270; 4 id. 1, 124, 398; 5 id. 264, 505; 6 id. 102, 124, 151, 283, 291, 369; 7 id. 1, 222, 404, 453, 469, 596.

(*b*) 12 Wheat. 153.

(*c*) Ibid.

the statute laws of the state, when applied to the title of lands. That such a course was indispensable and necessary in order to preserve uniformity, otherwise, the peculiar constitution of the judicial tribunals of the states and of the United States would be productive of the greatest mischief and confusion. That there was the same necessity and fitness in preserving a uniformity of decision in the one case as in the other.

§ 633. So, too, in another case,(*a*) the question arose upon the interpretation of a clause in a will which had received a judicial construction by the supreme court of Pennsylvania. It was urged that this was not one of those cases where the decision of the state courts, upon questions of local law, established rules of property which the United States could not disturb. But the court held that the question was one of so much doubt, that they were disposed upon this point, to acquiesce in the decision of the supreme court of that state,(*b*) that the word "*heirs*" in the will was to be construed as words of limitation.(*c*)

§ 634. The rule of construing statutes of other countries according to the judicial decisions of these countries, has also been adopted and applied where English statutes, such as the statutes of fraud and limitation, have been adopted into our own legislation. The known and settled construction of statutes by English courts have been either considered as silently incorporated into our own acts, or have been received by our judicial tri-

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(*a*) *Daly* v. *James*, 8 Wheat. R. 495.

(*b*) *Smith* v. *Folwell*, 1 Bin. 546.

(*c*) See also *Waring* v. *Jackson*, 1 Pet. R. 571; *Davis v. Mason*, 1 Pet. 505; *Le Grand* v. *Darnall*, 2 Pet. 670; *Inglies* v. *Trustees of S. Snug Harbor*, 5 Pet. 127; *Hind* v. *Vattier*, 5 Pet. 398; *McKeene* v. *De Lancey's Lessees*, 5 Cranch, 22; *Polk's Lessees* v. *Wendall*, 9 Cranch, 87; *Thatcher* v. *Powell*, 6 Wheat. 197; *Blight's Lessees* v. *Rochester*, 7 Ibid. 535.

bunals with all the weight of authority.(*a*) In like manner the construction which British statutes had received in England, at the time of the separation of this country from the British empire, have been considered as accompanying the statutes themselves. But although our courts very much respect subsequent decisions by the English courts, yet such subsequent decisions are not regarded as decisive, nor are they admitted by our courts as conclusive. So, too, if the English courts vary their construction of a statute which is common to both countries, our courts, however much they may respect such decisions, do not hold themselves bound to fluctuate with them.(*b*)

§ 635. In the courts of chancery in those states where there are separate courts of law and equity, such courts usually adopt the construction that may have been put upon a statute by the courts of law.(*c*) The chancellor of this state(*d*) held, that where a construction is to be put upon a statute which has been recently passed, where the supreme court has given a judicial construction to it, that construction would be followed, if not clearly wrong, by the court of chancery, so that different rules of construction might not prevail in the courts of law and equity in relation to the same statutory provision. Blackstone has laid down the general rule also, that there is not a single rule of interpreting laws, whether equitably or strictly, that is not applied equally by the judges in the courts both of law and equity. That the construction must in both be the same, or if they differ, it is only as one court of law may happen to differ from another.

(*a*) *Pennock* v. *Dialogue*, 2 Peters' R. 18.
(*b*) 5 Pet. R. 264.
(*c*) 1 Pet. C. C. R. 188; *Lessees of Talbot* v. *Simpson*.
(*d*) 5 Paige R. 80; 1 Pet. C. C. R. 188.

CHAPTER XIV.

OF STATUTES IN PARI MATERIA.

§ 636. We have remarked, in a previous chapter, that a statute is the best expounder of itself. In the present chapter we shall proceed to a consideration of the rules which govern in construing a statute by a reference to other statutes relating to the same subject-matter, and the influence which one part of a statute ought to have in the construction of other parts of the same statute; that is, of clauses upon other clauses in the same act, or, in other words, the doctrine of statutes in *pari materia*. Statutes which are *in pari materia*, are those which relate to the same person or thing, or to the same class of persons or things. The word *par* must not, however, be confounded with the word *similis*. It is used in opposition to it, as in the expression, *magis pares sunt quam similes*, intimating not likeness merely, but identity. Thus the English laws concerning paupers and their bankrupt acts, are construed together as if they were one statute, and as forming a united system—otherwise, the system might, and probably would be unharmonious and inconsistent. Such laws are *in pari materia*.(*a*)

§ 637. The whole system of legislation upon the subject-matter may be taken into consideration, in order to aid in the construction of a statute relating to the same

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(*a*) *United Society* v. *Eagle Bank*, 7 Conn. R. 469.

subject-matter; hence other statutes *in pari materia*, whether they be repealed or unrepealed, may be considered. Thus, in order to ascertain the true construction of the statute of 1784, c. 24,(*a*) relative to certain children not named in a will, who, by the act, were to have a portion of the estate of the parent assigned, as though the parent had died intestate, resort was had to the act of 12 Wm. 3, c. 7, of which provincial act the former act was a revision; and the court held, that to discover the true meaning of the statute, it was the duty of the court to consider other statutes *in pari materia*, whether they are repealed or unrepealed.

§ 638. So, too, where one statute was undoubtedly under the consideration of the legislature when passing another, the former ought, though long since expired, to be taken into consideration in construing the latter statute, and that for the reason that it is a rule in the construction of statutes, that all which relate to the same subject, notwithstanding some of them may have expired, or are not referred to, must be taken to be one system, and construed consistently, and the practice has always been so.(*b*)

§ 639. That several acts *in pari materia*, and relating to the same subject, are to be taken together, and comprised in the construction of them, because they are considered as having one object in view, and as acting upon one system, has been declared in several cases.(*c*) Chancellor Kent says, the object of the rule is to ascertain and carry into effect the intention; and it is to be inferred,

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(*a*) *Church* v. *Crocker*, 3 Mass. 21.

(*b*) Bac. Ab. Stat. II. 244; see also *Thayer* v. *Dudley*, 3 Mass. R. 296; *Holbrook* v. *Holbrook*, 1 Pick. R. 248, 254; *Menden* v. *Worceser*, 10 Pick. 235; *Sloop Elizabeth*, Paine C. C. R. 11.

(*c*) *Rex* v. *Loxdall*, and *The Earl of Ailesbury* v. *Pathison*, 1 Burrows, 447; Doug. R. 27.

that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious. Upon the same principle, whenever power is given by a statute, every thing necessary for making it effectual, or requisite to attain the end, is implied. *Quando lex aliquid concedit, concedere videtur et id perqaod devenitur ad illud.*(*a*)

§ 640. In doubtful cases, courts should compare all parts of a statute, and different statutes *in pari materia*, to ascertain the intention of the legislature; and however broad some of its expressions may be, yet if, on such examination, it shall clearly appear that they were intended to be limited by other provisions of the same act, or other acts upon the same subject, it is not improper to restrain them accordingly.(*b*) The case last cited is one illustrative of this rule. The sloop Elizabeth was libelled for having departed from the port of New York without a clearance or permit. Under the third section of the first supplementary embargo act, 9 Jan'y, 1808, which declared, "that if any ship or vessel shall depart from any port of the United States without a clearance or permit, such ship, and vessel, and goods, &c., shall be wholly forfeited;" the forfeiture was claimed under this section. Livingston, Justice, said: "From the very general and comprehensive phraseology here used, it is contended on behalf of the United States, that the court cannot except vessels of any description whatever. It is very certain that this section, taken by itself, and without reference to any other parts of this and other acts made *in pari materia*, would include the case of the Elizabeth. But it is the duty of the court, in construing a written law in *doubtful cases*, to compare all its parts, in order to discover the intention of the legislature: and

(*a*) 1 Kent, 463.

(*b*) *The Sloop Elizabeth*, 1 Paine C. C. R. 11.

however broad some of its expressions may be, yet if from such examination it shall clearly appear that they are, and were intended to be limited by other provisions of the same, or other acts on the same subject, it cannot be improper to restrain them accordingly. The first embargo law having required no security against its violation from any other than registered or sea lettered vessels, those licensed for the coasting trade were at liberty to depart from any port, without bond being given to reland their cargo in the United States. This omission was soon perceived, and in the very next month a supplementary act was passed. By the first section of this act, in case of a vessel licensed for the coasting trade, a bond was to be given in double her value and that of her cargo, that she should not proceed to any foreign port, and that the cargo should be relanded in the United States; and the second section provides, that it shall be sufficient in the case of a licensed vessel whose employment has been confined to rivers, bays and sounds, to give a bond in an amount equal to three hundred dollars for each ton, with condition that such vessel shall not be employed in any foreign trade during the terms limited in the condition of the bond. Having thus confined, by heavy penalties, coasting vessels within their legitimate spheres, the provisions of the third section most obviously refer to other vessels, for it can hardly be imagined, that after taking such ample security from river vessels, it would be thought necessary to impose on all sloops, &c., navigating different rivers of the United States, the necessity of taking a permit or clearance every time they sailed; for the permit which might have been obtained at the time of the vessel's being licensed, would not be a compliance with the act. But whatever doubts might be entertained on the construction of the section, it is much diminished, if not entirely removed, by a provision we find in another of the supplementary

embargo laws, which was passed 25th April, 1808, subjecting to forfeiture vessels of the description of the Elizabeth, if they depart from any district of the United States without having previously obtained a clearance. There is no way of accounting for this act, passed by the same legislature and at the same session, than on the supposition that, in their opinion, such vessels were, under the same laws, liable to no penalty whatever for leaving the port without a clearance; for if this interdiction already existed, and that under the heavy penalties of a forfeiture, what use could there be in saying, and that too by way of further sanction, that she should be forfeited by leaving a district, when departing only from a port was already followed with that consequence? This, then, is not deemed a cause of forfeiture.

§ 641. Statutes enacted at the same session of the legislature are to be taken *in pari materia*, and should receive a construction which will give effect to *each if possible*. But if *each* of them cannot have the same *entire effect*, when taken in connection with the others, that it would have if taken singly, they must be construed so as to give effect to what appears to have been the main intent of the legislature. This rule was laid down and acted upon in the case of *The State* v. *Rackley*.(*a*) In this case, on conviction under an indictment, the jury acquitted the defendant of costs, which were moved for *non obstante veredicto*. The question arose under the statute of 20th January, 1824; the seventy-second section provided, "Costs of suit shall, in all cases of conviction, be included in the judgment, where the jury do not find otherwise." Holman, J., says, "It is not contended but that this provision, taken in itself, confers on the jury a right, in cases of conviction, to acquit the de-

(*a*) 2 Black. R. 249.

fendant of costs. But it is urged, that this power in the jury is virtually taken away by the act regulating the fees of officers, which was passed at the same session of the legislature, and approved 30th January, 1824. By which statute it is enacted, that the officers therein mentioned shall be entitled to receive for their services the fees thereby allowed. Then follows a list of services for clerk, sheriff, &c., in criminal cases, in which it is stated that the prosecuting attorney's fee for every conviction upon indictment or presentment shall be five dollars. The fees in criminal cases allowed by this act, are the costs for which the judgment is usually given, and what the act, in ordinary acceptation, presupposes that the person convicted shall pay. This is the plain meaning of the act. But this meaning is not expressed in such positive terms as to authorize the court in saying that the act would admit of no other, if we should thereby render ineffective a previous enactment of the same legislature. This act gives the officers a right to the enumerated fees, but does not say in express words, that they shall be paid by the defendant in all cases of conviction; and the legislature having previously authorized the jury to acquit the defendant of costs, we cannot say that the two acts are so contradictory that they cannot stand together. Although by this construction, we find the officers of the court entitled to certain fees in criminal cases, without any legal method of obtaining them, whenever the jury think proper to discharge the defendant from the payment of the costs. There is another act on the subject of fees of the prosecuting attorney, which was also approved on 30th January, 1824, which provides, that in all judgments in criminal prosecutions against any defendant or defendants, the sum of five dollars shall be taxed in the bill of costs in favor of the prosecuting attorney. This act seems to be more repugnant to the dispensing power of the jury with respect to

costs, than the act regulating fees; yet if this act is not altogether inconsistent with that, we should give it that construction which, in our opinion, will give effect to what might have been the intention of the legislature in their several enactments. These acts being passed at the same session of the legislature, are to be taken *in pari materia*, and to receive a construction which will give effect to each if possible; but as each cannot have the same entire effect, when taken in connection with the others, as it would have if taken singly, we must so construe them as to carry into effect what appears to have been the main intention of the legislature. That intention we conceive to be this:—In criminal cases, the several officers, including the prosecuting attorney, shall be allowed certain fees, which, as a general rule, shall be taxed in the bill of costs against the person convicted, and for which judgment shall be given; provided, nevertheless, that the jury shall have a right to discharge a person convicted from the payment of costs. We conceive that, by this construction, there is less violence done to the intention of the legislature, than there would be in supposing that they, by one act, intended to defeat another that had been enacted at the same session.

§ 642. So statutes dictated by the same policy, and having in view the attainment of the same ends, and relating to the same subject-matter, may both be considered and construed as one statute. As if one statute prohibit the doing of a thing, and another statute be subsequently passed whereby a forfeiture is inflicted upon the person doing that act, both are to be considered and construed as one act.(*a*) Or when an action founded upon one statute is given by a subsequent statute in a new case, every thing annexed to the action by the first

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(*a*) *Stradling* v. *Morgan*, Plow. 206.

statute is likewise given.(*a*) Or if a thing contained in a subsequent statute be within the reasons of a former statute, it will be taken to be within the meaning of that statute.(*b*) But this is confined to those cases, and those only, where the latter statute is in the same reason as the former.(*c*) So too, where one statute is enlarged by another, and a third is passed reciting the first, the second is to be regarded as virtually recited in the last reciting act. For instance, the 13 Eliz. c. 10, concerning leases made by spiritual persons, was enlarged by 14 Eliz. c. 11; the former was only recited in 18 Eliz. c. 11, yet it was holden, that the latter was virtually recited therein.(*d*) In this case it was said, there is such a connection between all the statutes concerning leases of ecclesiastical persons, that they have been taken into the construction of one another. The statute of the 32d H. 8, is not recited within the one of 13 Eliz., yet a lease is not warranted upon these statutes, unless it hath the qualifications required by the 32 H. 8. And this course is usual in the construction of statutes *in pari materia.*

§ 643. Where one statute is continued, and some additional clauses added in another, the latter statute will be construed as if the former had been recited therein. The 22 and 23 Car. 2, c. 10, for better settling intestates' estates, was continued, with some additional clauses, by 1 Jac. 2, c. 17, and it was holden by Lord Hardwicke, that for this reason, the latter statute must be construed as if the former had been therein recited. Whenever it can be gathered from a subsequent statute *in pari materia*, what meaning the legislature attached

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(*a*) Bro., Waste, pl. 68.
(*b*) Ld. Raymond, 1028; *Sir Wm. More's case.*
(*c*) Ibid. 1048.
(*d*) 1 Vent. 246, *Bayley* v. *Minin.*

to the words of a former statute, this will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.(*a*)

§ 644. The cases above cited, some of which have been fully annoted, are deemed to be sufficiently illustrative of the manner in which, and the extent to which, and when, courts will be governed by statutes *in pari materia*, as well as indicative of the influence such statutes should have on the mind of the court in the ascertainment of the intent of the legislature, where from the language of the act that intent is doubtful. This rule, like all others, must be applied with much care and discrimination, and only to that class of cases to which it is applicable. Before proceeding to note the exceptions to the rule itself, it should be remarked, that it is only in cases where the meaning of any particular section or clause of a statute is questioned, or doubtful, from the language of the act, that it is proper to look into other statutes *in pari materia*, to ascertain such intent; for if the language be clear and implicit, so as to leave no doubt upon the mind as to what was such intent, then, and in such a case, there is no room for construction, nor is there in such a case any need of such a resort.

§ 645. Although it is unquestionably true, that public statutes made *in pari materia*, should be construed as though their several provisions were contained in one act, or that an act may be construed by comparison with another, all having relation to the same subject-matter, yet it has in one case been doubted, even in the construction of public statutes, whether this principle should in any case be admitted, where they relate and extend to distinct subjects, independent of each other; and it was in the same case held, that in the exposition of private statutes, conferring special privileges, or imposing

(*a*) *Morris* v. *Mellin*, 6 Barn. & Cress. 454; 7 B. & C. 99.

particular obligations, it is not proper to resort to the language of any other private act, not relating to the same parties and the same subject-matter. Such private statutes standing on the same basis with contracts by deed, which are not to be affected by evidence *aliunde*. And also for the reason, that an individual who receives a grant from the legislature, or when a private act is passed for his benefit, is not bound to look into, and carefully examine the language of other grants and private acts, in order to ascertain the true meaning of the grant or act made for his own benefit.(*a*)

§ 646. This principle was applied in the case last cited, where the defendant was appointed trustee to manage a lottery, and had given a bond for the faithful performance of his duties; and one question was, whether the court could travel out of the condition of the bond, and beyond the provisions of the act to which it referred, to get rid of its import and intent, by reference to another statute, authorizing another lottery, and which contained provisions more liberal than were contained in the act under which the bond was given; for the purpose of inferring from the difference in the phraseology, that a more strict and deeper accountability was intended on the part of the managers of this lottery. It was held it could not. In another case it was said: "But private acts of the legislature, conferring distinct rights on different individuals, which can never be considered as being one statute, or the part of one general system, are not to be interpreted by a mutual reference to each other. As well might a contract between two persons be construed by the terms of another contract between different persons."(*b*)

(*a*) *Thomas* v. *Mahan*, 4 Maine R. 513.

(*b*) Per Hosmer, Ch. J., *United Society* v. *The Eagle Bank of New Haven*, 7 Conn. R. 470.

§ 647. The rule we have thus far been considering is that of different statutes *in pari materia*. There is another rule analogous to this, which is, that in the construction of one part of a statute, every other part of the same statute ought to be taken into consideration; indeed the most natural and genuine way of construing a statute is, to construe one part by another part of the same statute, for this best expresseth the meaning of the makers; and such construction is *ex visceribus actus*. Another reason assigned for this rule is, that a law is the best expositor of itself, and hence every part is to be taken into view, for the purpose of discovering the mind of the legislature, and that the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act. This rule was adopted and applied in the case of *Pennigton* v. *Coxe*,(*a*) and there are numerous cases also illustrative of the rule.(*b*)

§ 648. The case of *Strode* v. *The Stafford Justices*,(*c*) is one which is peculiarly illustrative of the rule, and the true mode of its application. The only question in that case was, whether the limitation of five years, contained in the twenty-second section of the judiciary act, could be pleaded to a writ of error in fact. That section of the act contained the following clause: "And writs of error shall not be brought but within five years after passing the decree complained of." This clause, standing unconnected with other provisions which necessarily limit its operation, would extend to all writs of error, as well in fact as otherwise. This was conceded by Mar-

(*a*) 2 Cranch R. 33.

(*b*) *Canal Co.* v. *Rail Road Co.*, 4 Gill & John. 4; The opinion of the Judges, 22 Pick. 571; *Holbrook* v. *Holbrook*, 1 Pick. 248.

(*c*) 1 Brocken. R. 162.

shall, Ch. J.; but he held it was intermingled with other clauses, which essentially influenced its construction; that it was perfectly clear, that the writs of error given in the twenty-second section was not a writ of error *coram nobis*, but a writ to be issued from a superior court, for the purpose of correcting the errors of an inferior jurisdiction. It was contended in this case, that the general words "and *writs of error*," &c., were unrestricted, and applied to *all* writs of error whatever, whether such as congress then had in contemplation, or such as were at the time entirely out of the mind of the legislature. But it was held, that this would be a manifest departure from the common principles of construction, and from what appeared to be the plain intent of the act; that these words, though general, were not such as to show that the term "writ of error" was used in this instance in a more extended sense than was affixed to it throughout this and the twenty-third and twenty-fourth sections of the act. Marshall, Ch. J., speaking of the words, says: "They are 'and writs of error,' that is, writs of error which are the subject of the law. It is probable that had a more extended operation been intended, such terms would have been used indicative of that intention. Instead of the words 'and writs of error,' we should most probably have found the words, 'all writs of error whatever,' or 'all writs of error, whether brought in a superior court or in the same court,' or some other terms indicative of an intention to regulate writs which were not the objects to which the attention of the legislature was at the time directed." It was also in this case urged, that one sentence of a law could not be affected by the context. To this proposition the learned chief justice said: "I should as soon have expected that one sentence of a will was not affected by other parts of the will; in each the intention of the maker is to be effected, and consequently each in-

strument must be wholly inspected;—without reasoning upon this subject, the books abound with authorities which seem to be conclusive. In 1 Inst. 381, Lord Coke says: 'It is the most natural and genuine exposition of a statute, to construe one part by another part of the same statute, for that best expresseth the meaning of the makers.' He afterward adds: 'and this exposition is *ex visceribus actus.*' The instances which illustrate this axiom in the construction of statutes are numerous. They are to be found in all the books which touch on the subject, and many have occurred in the supreme court of the United States."

§ 649. When the meaning of any particular section or clause of a statute is questioned, it is no doubt proper to look into other parts of the statute; otherwise the different sections of the same statute might be so construed as to be repugnant, and the intention of the legislature might be defeated: and if, upon the examination of the general meaning and objects of the statute, it should be found inconsistent with the literal import of any particular clause or section, such clause or section must, if possible, be construed according to the spirit of the act. But to warrant the application of this rule, the intention of the legislature, as collected from the whole act, must be clear and manifest.(*a*) But as the spirit, as well as the letter of a statute, must be respected, hence where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid in that intent.(*b*)

§ 650. Where the words of a statute are express,

(*a*) *Mendon* v. *Worcester*, 10 Pick. 235; *Commonwealth* v. *Cambridge*, 20 Pick. 267; *Holbrook* v. *Holbrook*, 1 Pick. 250.

(*b*) *Durousseau* v. *The United States*, 6 Cranch, 307.

plain and clear, they are to understood according to their genuine and natural signification and import, unless, by such exposition, a contradiction or inconsistency would arise in the statute by reason of some subsequent clause —from whence it might be inferred that the intent of the legislature was otherwise.(*a*) And where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed; and in such case there is no room for construction. But if from a view of the whole law, the evident intention is different from the literal import of the terms employed to express it in a particular part of the law, that intention should prevail; for that, in fact, is the will of the legislature.(*b*)

§ 651. In the construction of a statute, by a consideration of all its parts, great difficulty not unfrequently arises from the fact that there may be, in some parts of the act, general words inconsistent with the import of particular words in other parts of the same act. It is said(*c*) that general words in an act of parliament may be qualified by subsequent sentences or clauses in the same statute. In *Andree et al.* v. *Fletcher*,(*d*) the question arose whether an insurance in England on a foreign ship was void within the statute 19 Geo. 2, c. 37, which declared "that it should not be lawful to make re-assurance, unless the insurer shall be insolvent, become a bankrupt, or die." It was contended, that because a prior part of the statute which restrained insurances, interest or no interest, had been held not to extend to foreigners, this clause should also be confined to insurances on English

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(*a*) Parker, 233; Hob. 93, 97; *United States* v. *Bright*, C. C. U. S., Pa. Pamph. 188; Bac. Ab. Stat. I.

(*b*) *United States* v. *Fisher*, 2 Cranch, 386, 399.

(*c*) 8 Modern, 8; *Rex* v. *Archbishop of Armagh et al.*

(*d*) 1 T. R. 161.

ships. Buller, J. said: "It has been argued, because one clause of this statute does not extend to foreign ships, the others shall not. But if, in the same act of parliament, there be one clause which applies to a particular case, and another which is conceived in general terms, the former shall not restrain the signification of the latter. But it rather operates the other way, for it shows that the legislature had both cases in their view at the time of passing the statute, and when they meant to confine the prohibition to British ships, they have done so; but where they did not intend to confine it, they have omitted the restriction."

§ 652. It would seem, on reading the rules laid down in the two cases last cited, that they are directly in conflict with each other; and yet, such apparent conflict evidently arises from the unqualified and unguarded manner in which, the proposition is laid down in 8 Modern. The true rule in reference to that proposition is that laid down by Chief Justice Marshall, in the case of *Adams* v. *Wood*,(*a*) which is this—that the general expressions of a statute may be restrained by subsequent *particular words, which show that in the intention of the legislature, those general expressions were used in a particular* SENSE." That is, where from the whole act it is manifest that the legislature intended to use the general words in the restricted sense of subsequent particular words, in such case, as the intent is to be followed when apparent, the general words are to be controlled and restricted so as to meet the provision of the act expressed in the particular language, used in subsequent parts of the same act. This rule is based upon the ground that where a general intention is expressed, and the act also expresses a particular intention which is incompatible

(*a*) 2 Cranch, 336.

with the general intention, the particular intention is to be considered in the nature of an exception.(*a*)

§ 653. Where a particular thing is given or limited in the preceding part of a statute, this shall not be taken away or altered by any subsequent general words of the same statute.(*b*) This rule may perhaps be illustrated by the following example. The law of Virginia, December 15, 1776, usually termed the penitentiary act,(*c*) in the first section enacts that "no crime whatsoever committed by any *free* person against the commonwealth, except murder of the first degree, shall be punished with death. In all the subsequent sections, the word *free* is omitted, and no words of reference are used so as to connect them with the first section. Yet it has been uniformly held, that all the provisions of that law relate to free persons only, and that the subsequent sections, although the words are general, shall be restricted by the first, and the general intention of the legislature indicated in that section.

§ 654. It is not unfrequently the case that a statute in its general provisions embraces cases which are intended by the legislature not to be included within it. Such cases are usually taken out of the statute by a saving clause or a proviso. A saving clause in a statute is only an exception of a specific thing out of the general thing mentioned in the statute.(*d*) There are instances in which the saving clause is repugnant to the purview of the act, and in such cases it is said that the saving clause is void.(*e*) This rule proceeds upon the same principle that prevails in reference to deeds, that a reservation of

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(*a*) 5 Bing. 180 and 492, 3 ; Ibid. 68.

(*b*) *Standen* v. *The University of Oxford*, 1 Jon. 26 ; 1 Step. El. L. 6.

(*c*) Rand Abr. 359.

(*d*) 1 Kent, 462 ; Co. Litt. 381.

(*e*) 1 Rep. 47 ; *Alton Wood's case*, Plow. 564.

the thing granted being repugnant to the grant itself, so that both cannot consistently stand; and as the deed is to be taken most strongly against the grantor, as something was evidently intended to be granted, the reservation is void on the ground of such repugnancy.

§ 655. The following instances are illustrations of the rule above stated. I. S. was tenant in fee simple of the manor of Dale, or tenant in tail thereof, the reversion to the king. An act of parliament was passed, giving this manor, in express words, to the king, saving the right, title and interest of all persons; and it was held, that the saving clause did not save the estate of I. S., for the reason that the saving as to the owner of the land was repugnant, inasmuch as the manor is, by express name, given to the king; and if the general saving should be extended to the owner of the land, then the act would be made in vain. So, too, if it be recited in an act of parliament, that whereas I. S. is seised of certain land in fee, and the land by the act is given to the king in fee, saving the estates and rights of all persons, the estate of I. S. is not saved; for that would be repugnant to the grant, and make the express gift void. Numerous instances of this character are stated in the case of *Alton Wood*.(*a*) It is there said, "And it appeareth in our books, that a saving in an act of parliament which is repugnant to the body of the act is void, as in Plowden Com. 563, b. where the supposed attainder of the Duke of Norfolk was, by an act of parliament, declared to be null and void *ab initio*, saving the estate and leases made by King Edward VI., that saving was void; for when the attainder was declared to be void, the said saving was against the body of the act, and therefore void."(*b*)

(*a*) 1 Co. 47.

(*b*) See also *Riddle* v. *White*, 4 Cwill. 1394; *Ward* v. *Cecil*, 2 Vern. 711; 5 Cru. Dig. 23; Viner's Ab. Stat. E. 8, pl. 5.

§ 656. When it is said, that where the saving is repugnant to the purview of the act, it is void; by the purview of the act is to be understood, the enacting part, or body of the act, in contradistinction to the preamble.(*a*) Although it is true that the rule above laid down is well estabilised, it is equally true, that the purview of a statute may be restrained by a saving in the statute, and such saving will be effectual for that purpose in all cases, where it is not repugnant to the body of the act; that is where the saving clause may prevail, and yet not quite overthrow the entire body of the act, or render it completely nugatory;(*b*) as in the case of a deed, the language of the grant may include an entire estate, and there may be in the same deed a reservation or exception of part of the thing granted, which will be good; although a reservation of all that was granted would be void, on the ground of repugnancy to the grant. In the former case both may stand, and yet the deed have some effect as a grant, whereas in the latter, both cannot stand without rendering the grant entirely nugatory. The rule itself, as well as the reasons for it, apply with equal force in the construction of a statute as of a deed. The reason for the rule, and the principle upon which it is based in all cases, sheds light upon the question as to whether a saving is void or not, and if kept distinctly in view will enable any one readily to determine questions arising under this rule.

§ 657. We have seen that a saving clause is only an exception of a specific thing out of the general thing mentioned in the statute. The object of a proviso to a statute is, to either except something from the enacting clause, or to qualify or restrain its generality, or to ex-

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(*a*) *Paynes* v. *Canner*, 3 Bibb, 181

(*b*) *Thornly and Fleetwood* v. *Duchess of Hamilton*, 10 Mod. 115.

clude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview.(*a*) There has been a distinction in some of the books between a saving clause and a proviso in a statute, though the reason of the distinction is not very apparent. It was held by the barons of the exchequer, in the case of the *Attorney General* v. *The Governor and Co. of the Chelsea Water Works*,(*b*) That where the proviso of an act of parliament was directly repugnant to the purview of it, the proviso should stand, and be held a repeal of the purview, because it speaks the last intention of the lawgiver. It was compared to a will, in which the latter part if inconsistent with the former, supersedes and revokes it. In reference to this distinction Chancellor Kent has said: "But it may be remarked, upon this case of Fitzgibbon, that a proviso repugnant to the purview of the statute, renders it equally nugatory and void as a repugnant saving clause; and it is difficult to see why the act should be destroyed by the one and not by the other, or why the proviso and the saving clause when inconsistent with the body of the act, should not both of them be equally rejected."(*c*)

§ 654. Sometimes it happens, that a statute makes use of a word in one part of it, which is susceptible of two meanings, and in another part of the same statute the same word is used in a definite sense. In such cases, it is a rule of construction that it is to be understood throughout in that sense, unless the object to which it is applied, or the connection in which it stands, re-

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(*a*) *Minis* v. *The United States*, 15 Peters, 445.
(*b*) Fitzg. R. 195.
(*c*) 1 Kent, 462.

quires it to be differently understood in the two places.(*a*) But this rule is not to be applied to cases where, from the language of the act, to confine its use to a definite sense, will render any clause, sentence, or word superfluous, void, or insignificant.(*b*)

§ 659. It sometimes happens that a section is introduced into a statute, which appears a stranger to and unconnected either with the preamble, or to the general purview of the act, in such cases, but little aid is derived in its construction either from the preamble, or purview of the act. The rule of construction in such a case, as laid down in Bacon's Abr. Statute, I., is, that it must take effect according to its obvious meaning, independent of all influence from other parts of the law. And even if it be a part of the same subject, and either enlarges or restrains the expressions used in other parts of the same act, it must be interpreted according to the import of the words used, if nothing can be gathered from such other parts of the law to change the meaning. But if in this latter case general words are used, which import more than seems to have been within the purview of the law, or of other parts of the law, and those expressions can be restrained to others used in the same law, or in any other upon the same subject, they ought to be so restrained. What we have said in this chapter as well as in a previous chapter is all that is deemed necessary as illustrative of the rule in reference to the construction of statutes *in pari materia.*

(*a*) *Den ex dem. James* v. *Dubois*, 1 Har. N. J. R. 293.
(*b*) Ibid. 293.

CHAPTER XV.

OF AFFIRMATIVE AND NEGATIVE STATUTES.

§ 660. Some statutes are, from their being in affirmative terms, called affirmative statutes; others obtain the name of negative statutes, because they are penned in negative terms. It is a maxim of the law, that an affirmative statute does not take away the common law. It is laid down as a rule in the Institutes; if a statute gives a remedy in the affirmative without a negative, expressed or implied, for a matter which was actionable at common law, the party may sue at the common law, as well as upon the statute, for this does not take away the common law remedy.(*a*) Thus, it has been held, that where a statute authorized the erection of a mill-dam upon one's own land, upon a creek or river which is a public highway, although it might protect the party from indictment for a nusance; if in doing it, he flow his neighbor's land, he is liable to an action, even though the act provides for a summary mode of appraising and paying the damages arising from such a consequence.(*b*) In the case cited the court held, that if there had been no express provision in the act for the payment of damages, the defendant would have been still liable to pay them; and the only effect of this provision was, to enforce the duty of making compensation by additional sanctions, as the grant or license might be avoided, if the defendant

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(*a*) 2 Inst. 200.

(*b*) *Crittenden* v. *Wilson*, 5 Cow. 165.

should fail to pay the damages in the manner prescribed by the act. The effect of the grant was merely to authorize the defendant to erect a dam, as he might have done if the stream had been his own, without a grant. In that case he would have been responsible in damages for all the injury occasioned by it to others. It was not the intention of the legislature, by making it a condition of the grant, that the defendant should pay the damages which might result to third persons from his dam, to be ascertained in the manner pointed out in the act, to deprive those who might sustain injury of their remedy by action. Their object was to provide a summary remedy for those who might be injured by the dam, by which they might be remunerated more expeditiously and with less expense than by the ordinary course of law. But as there was nothing in the act which either in terms, or by necessary implication, made it compulsory upon those who might be injured to have their damages assessed under the act, or deprive them of their pre-existing common law remedy by action—as the act was not couched in negative terms, the remedy which it provided was merely cumulative, and not exclusive. The court based their decision upon the above rule laid down in the Institutes, which it cites, as the rule applicable to such a case.(*a*)

§ 661. In another case(*b*) it was held, that where a new right is introduced by statute, the party complaining of its violation was confined to the statutory remedy, if one be prescribed. But that it would be otherwise where the right existed at common law, and an affirmative statute intervenes, inflicting a new penalty. The court said, if a statute is introductive of new rights

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(*a*) See *Beckford* v. *Hood*, 7 T. R. 628.

(*b*) *Lang* v. *Scott*, 1 Blackf. Ind. R. 405.

which did not before exist in the country, and prescribes the penalty for their violation, the persons claiming under the act, must depend for the security of the rights thus claimed upon the provisions therein specified. In the case last cited, the action was for erecting an unauthorized ferry within two miles of the plaintiff's ferry. The court held, that as the exclusive privileges of ferries were not known in that state until they were authorized by statute, and as the statute by which they were authorized prescribed a specific penalty for their violation, upon the provisions of the act the owners of the ferry must rely for the security of their rights, so far as the courts of common law were concerned.

§ 662. *Almy* v. *Harris*(*a*) was also an action on the case, for disturbing the plaintiff in the enjoyment of a ferry granted to Harris. It was held that the action would not lie. The act to regulate ferries within this state prohibited any person within certain districts from keeping or using a ferry, for transporting across any river, stream, or lake any goods or merchandise for profit or hire, unless licensed in the manner directed in the act, under a penalty of five dollars. If the plaintiff had possessed a right at common law to the exclusive enjoyment of this ferry, then the statute giving a remedy in the affirmative, without a negative expressed or implied, for a matter authorized by the common law, he might, notwithstanding the statute, have his remedy by action at the common law. But as he had no such right at common law, nor any right except that derived from the statute, consequently he could have no rights since the statute but those it gave, and must pursue his remedy under the statute.(*b*)

(*a*) 5 J. R. 175.

(*b*) See *Bissel* v. *Larned*, 16 Mass. R. 65.

§ 663. But where a right is granted by statute, and the act granting the right is silent as to the remedy, and a subsequent statute is passed giving a forfeiture or penalty for the violation of that right, as the right had become vested by the first act, such forfeiture or penalty is regarded merely as cumulative to the remedy provided at common law, in cases of the violation of a statute right, where the statute creating the right is silent as to the remedy. This rule was distinctly recognized by Justice Thompson, in the case of *Livingston* v. *Van Ingen.*(*a*) In that case, the legislature had granted, under the act of 1798, to certain persons the sole and exclusive right of using and navigating boats by steam in the waters of this state, but that act was silent as to the remedy for an infringement of the right. Subsequent acts created a forfeiture of boats used in violation of the right secured. Such forfeiture was held to be cumulative merely. Thompson, Justice, said in that case, "But it is said that the right claimed by the appellants being created by statute, they are entitled to no other remedy than that which the statute gives. Without examining whether the rule of law upon which this objection is founded is not confined to criminal cases altogether, it certainly cannot be applied to the present case, for the forfeiture is not given by the same statute which created and gave the right, nor until the right was actually vested in the appellants, by a fulfilment of the terms and conditions upon which they were to be entitled to the exclusive privilege now claimed by them; and if the right was vested, all existing remedies to enforce it were also vested, and are not to be taken away by implication. The act of April, 1808, creating the forfeiture, purports to be an act for the further encouragement of the

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(*a*) 9 J. R. 507.

appellant's steamboats, which plainly shows that the remedies therein provided were intended as cumulative, and in addition to those already existing."

§ 664. Where a statute does not vest a right in a person, but only prohibits the doing of some act under a penalty, the party violating the statute is liable only to the penalty. But where a right of property is vested in consequence of the statute, it may be vindicated by the common law, unless the statute confines the remedy to the penalty. This distinction was recognized and applied in the case of *Barden* v. *Crocker*,(*a*) The statute of 1815, ch. 11, sec. 1, provided that the town of M. should at a legal town meeting dispose of and grant, upon such conditions and under such restrictions and regulation as said town should establish, for that year, and so from year to year, the sole privilege of catching alewives with scoop nets or set nets, on the days and at the places designated by the act, to such person or persons as should give the most for the same, and give sufficient security for payment: such person so purchasing were to have the right to take fish, and no other person whatever. It further provided, that if any person should obstruct the passage of the fish, he should be liable to a penalty not exceeding $20, and not less than $5, to be recovered by indictment, complaint, or action of debt; the one half to the town, and the other half to the prosecutor. In an action for obstructing the passage of such fish, it was held, that the remedy prescribed by the statute was cumulative, and that an action on the case at common law might be maintained by the vendee, to whom the privilege had been sold by the town, against the person obstructing the passage of fish. The court placed their decision upon the ground that the grantee of the town

(*a*) 10 Pick. 383.

acquired a valuable interest or franchise in the fishery, and entitled at common law to a remedy for its disturbance. That in all cases where a man has a temporal loss or damage by the wrong of another, he might have an action on the case, to be repaired in damages. In answer to the objection that the plaintiff's remedy should have been a suit for the penalty, or by abating the nuisance, the court held it was clear, at common law, were it a public nuisance, one who sustained a particular injury might have his action for the damages, and the same rule must apply to a private nuisance. The remedies were cumulative. The penalties inflicted in the act were recoverable by a process in the nature of a prosecution for the public, but that could not affect the common law right of an individual to recover the particular injury sustained by reason of the nuisance. The suit for the penalty might be brought by persons who had no exclusive right to the fish, and would give no satisfaction for the injury done to the true owner. The penalty operated as a punishment of the offender, but made no adequate compensation for the particular injury to the plaintiff. That the distinction to be taken was where a statute does not vest a right in a person, but only prohibits the doing of some act under a penalty; in such cases the party violating the statute is liable to the penalty only. But where a right of property is vested in consequence of the statute, it is to be vindicated by the common law unless the statute confines the remedy to the penalty.

§ 665. The same rule obtained in another case.(*a*) The statute of 8 Anne, c. 19, gave to authors the sole right and liberty of printing their works for fourteen years, and certain penalties for violating the act. The

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(*a*) *Beckford* v. *Hood*, 7 T. R. 620.

action in this cause was case for damages which the author had sustained for an invasion of his literary property. It was contended that his only remedy was for the penalty. The court held that the right of property was vested in the author, and the penalty a mere cumulative remedy. Lord Kenyon said: "The statute having vested the right in the author, the common law gives the remedy by action on the case for the violation of it. But it is agreed that as the statute in the same clause that creates the right has prescribed a particular remedy, and that no other can be resorted to; and if such appeared to have been the intention of the legislature, I should have subscribed to it, however inadequate it might be thought. But their meaning in creating the penalties in the latter part of the clause in question, certainly was to give an accumulative remedy." Ashurst, Justice, said: "Now I only consider the action for the penalties given to a common informer, as an additional protection, but not intended by the legislature to oust the common law right to prosecute by an action any person who infringes this species of property which would otherwise mainly attach upon the right of property so conferred. Where an act of parliament vests property in a party, the other consequence follows, of course, unless the legislature make a special provision for the purpose, and that does not appear to have been intended in this case. The penalties to be recovered may indeed operate as a punishment upon the offender, but they afford no redress to the injured party. The action is not given to him, but to any person who may get the start of him and sue first. It is no redress for the civil injury sustained by the author in the loss of his full profits."

§ 666. Where a statute gives a new power, and at the same time provides the means of executing it, those who claim the power can execute it in no other way.

Thus in *Andover and Medford Turnpike Co.* v. *Gould*,(*a*) where a statute authorized assessments to be made upon the shares of the corporation, and that whenever any proprietor should neglect or refuse to pay a tax or assessment within a limited time, the treasurer might sell the shares of the delinquent at public auction for the payment of the tax. It was held that in the absence of an express promise to pay, no action could be sustained to recover the assessment, but that the remedy was that pointed out in the act.

§ 667. It is in general true, that if an affirmative statute, *which is introductive of a new law*, direct a thing to be done in a certain manner, that thing shall not, even although there are no negative words, be done in any other manner. Thus it has been held, that under the statutes of Massachusetts, which directed the method of laying out highways, provision was made that if any person be damaged in his property by laying out a highway, the town where the same is shall make such person satisfaction, according to the estimation of the committee; and provision was made, that the court of sessions might order the payment of such sum of money as should be assessed in damages, to be paid by the town out of the treasury, and in default of payment after a reasonable time, the court might levy the same by warrant of distress upon the personal property of the inhabitants. It was held that an action of debt against the town could not be sustained, although the sessions had omitted to order payment of the damages.(*b*) In the case cited from Plowden it was held, that if an action founded upon

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(*a*) 6 Mass. R. 41; see also 1 Metcalf, 138; 3 Fairfield, 388; 19 Wend. R. 405; 7 Mass. R. 102; 8 Mass. 138; 10 Mass. 284; 14 Mass. 286; 14 Pick. 483; 16 Mass. 94; 3 Metcalf, 520.

(*b*) *Gedney* v. *Inhabitants of Tewksbury*, 3 Mass. R. 308. See also Plowden, 206; *Stradling* v. *Morgan*, Hob. 298; Sid. 56.

a statute be directed to be brought before a particular court, or a particular justice in his sessions, it cannot be brought before any other person, or in any other place. In *Forbes' case*(*a*) it was held, that under a statute which provided that error in the exchequer chamber should be amended before the chancellor and treasurer, such error could not be amended before any other person or persons. The cases above cited clearly establish the rule, that where a new power is given by an affirmative statute to a certain person, or to certain persons, by the designation of those persons, although it be an affirmative statute, all other persons are in the general excluded from the exercise of the power. This rule is founded upon the maxim, that *inclusio unius est exclusio alterius*. But if anterior to the passage of such an affirmative act, giving such new powers to a designated person or persons, other persons had by a previous statute power to do the same act, the giving of such power by an affirmative act to a certain designated person or persons does not exclude the persons having such antecedent power from the exercise of the same power.(*b*) Lord Bacon cites the following instance as illustrative of this rule. By the 8 Hen. 6, c. 16, it is provided: "That after office found, he who finds himself aggrieved may, within a month offer his traverse, and to take the premises to farm; and the chancellor, treasurer, or other officer shall demise them to farm." By the 1 Hen. 8, c. 16, liberty is given to the persons aggrieved, "to do this at any time within the space of three months." Afterwards the 32 Hen. 8, c. 40, authorizes the master of the wards "to grant a lease of the lands of a ward or an idiot while they remain in the hands of the crown." This last clause, not-

(*a*) 11 R. 59.
(*b*) *Davis* v. *Edmonson*, 3 Bos. & Pul. 387.

withstanding the designation of a new person, shall not take away the power given by the former; for if before any lease is granted by the master of the wards the chancellor or treasurer grant a lease of the premises, the master of the wards cannot afterwards demise them.(*a*)

§ 668. But where an offence is created by statute, and a specific remedy prescribed, that remedy alone can be pursued.(*b*) In the case last cited, the defendant was indicted for retailing spirituous liquors without a license. The statute of Indiana, under which the indictment was found, declared that for every offence against its provisions the offender should pay three dollars, and that the fines should be collected in a given way. But it was held, that as the statute created the offence, and it was one which did not exist at common law, it was not indictable, and that the only remedy was that provided for in the act. The rule that where a statute creates an offence unknown to the common law, and in the enacting or prohibiting clause points out the mode of proceeding under it, that mode alone can be pursued, is not applicable to beneficial statutes in civil cases, was distinctly held in the case of *The Hartford and New Haven Rail Road Co.* v. *Kennedy*,(*c*) and seems impliedly to have received the sanction of Mr. Justice Thompson, in one of the cases decided by him.

§ 669. Where a statute makes that unlawful which was lawful before, and appoints a specific remedy, that remedy must be pursued and no other. It would be otherwise, however, if the offence were before punishable at common law, for then the particular remedy given by statute would be regarded as cumulative, and in such cases either the statutory or common law remedy might

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(*a*) Bac. tit. Statute, p. 236.

(*b*) *Sturgeon* v. *The State*, 1 Blackf. R. 39.

(*c*) 12 Conn. R. 500.

be pursued.(*a*) A distinction is however taken in those cases where the offence is created, and the penalty given by the same statute, provided they are in separate clauses. In *The King* v. *Harris*(*b*) this disinction is recognized. Ashurst, Justice, says, "it is a clear and established principle, that where a new offence is created by an act of parliament, and a penalty is annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty, but he may proceed on the prior clause on the ground of its being a misdemeanor." The distinction taken in this case was alluded to and received the sanction of the court in the case cited from 12 Conn. Reports, and the court in that case, as has been seen, applied the rule to a civil case, creating a right in one section of a statute, and providing a specific remedy in a subsequent section of the same act. If a statute without any negative words, declare that deeds shall have in evidence a certain effect, provided particular requisites are complied with, this does not prevent their being used as evidence, though the requisites were not complied with, in the same manner as they might have been before the statute was passed. Hence, in a case where by the sixth section of the act of January, 1762, of the colony laws, it was declared, that every former division of lands of which there was a map or note in writing, under the hands of the proprietors, should be a valid partition, provided such map or note be proved before a judge of the supreme court, and a true copy of such map filed, and such note recorded; on the trial of an action of ejectment, a deed down to the date of a partition and map was admitted in evidence, although it was objected, that it was not admissible, because it did

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(*a*) *Rex* v. *Robinson*, 2 Burr. 799; 1 Will. Saund. 135, note 4; ibid. 250 and note 3.

(*b*) 4 T. R. 205.

not appear that the map had been filed or the certificate of proof recorded. In answer to this objection the court held, that the act of 8th January, 1762, sec. 6, declared that every former division of lands of which there is a map or note in writing, under the hands of the proprietors, shall be a valid partition thereof, *provided*, such map or note be proven, &c. That if the condition on which all such previous partitions were declared valid be not performed, the transaction was left as it was before, and was to be considered independent of the act. That the division and the deed between the proprietors, by which they covenanted to abide by it, and the separate possession taken in pursuance of it, severed the tenancy in common. The parties became concluded and bound by the act, and the map and deed being proved before a competent officer, and possession having gone accordingly, the deed and map were admissible as legal evidence in the case.(*a*)

§ 670. Where a statute directs a person to do a thing in a certain time, without any negative words restraining him from doing it afterwards, the naming of the time will be considered as directory to him, and not as a limitation of his authority. In a case where the assessors of a school district were directed to assess a school district tax within thirty days after the district clerk had certified the vote for raising it, it was held that although the assessors were directed to assess the tax within thirty days after the certificate, yet as there were no negative words restraining them from making the assessment afterwards, and accidents might happen which would defeat the authority, if it could not be exercised after the expiration of thirty days; that the naming of

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(*a*) *Jackson ex dem. Van Vecten et al.* v. *Bradt*, 2 Caines' R. 169.

the time must therefore be considered as directory to the assessors, and not as a limitation of their authority.(*a*)

§ 671. In another case,(*b*) where the militia law made it the duty of the commanding officer of the brigade to appoint a brigade court-martial *on* or *before* the first day of June in each year, it was insisted that an order made subsequent to the day specified in the act was void, and a fine imposed by a court-martial under such order illegal. The question presented in this case was, could the power given to the commandant of the brigade to appoint a court-martial be exercised after the first day of June. The court, in the decision of this question, laid down the general rule to be, that where a statute specifies the time within which a public officer is to perform an official act regarding the rights and duties of others, it will be considered as *directory*, unless the nature of the act to be performed, or the language used by the legislature, show that the designation of time was intended as a limitation of the power of the officer. In this case there was nothing in the nature of the power showing that it might not be as effectually exercised after the limit of June as before ; and as the act giving it contained no prohibition to exercise it after that period, the naming of that day was a mere direction to the officer in relation to the manner of executing his duty, there was nothing in the nature of the power given, or in the manner of giving it, that justified the inference that the time was mentioned as a limitation.(*c*) In *Merchant* v. *Langworthy*,(*d*) it was held that the provisions of the statute requiring the clerk of a school district to post notice of annual meetings, was directory merely to that officer.

(*a*) *Pond* v. *Negus*, 3 Mass. R. 232.
(*b*) *The People* v. *Allen*, 6 Wend. R. 486.
(*c*) See also *The People* v. *Peck*, 11 Wend. 604.
(*d*) 6 Hill, 646.

In the last case cited, the statute contained an express provision that the want of notice should not invalidate the proceedings of an annual meeting, but the court held that the result would have been the same if the statute had not contained such a provision, as the annual meeting was required to be held in each school district, and at each annual meeting the time and place of holding the next annual meeting was to be fixed. In another case,(*a*) it was held that although the act regulating sales of real property on an execution makes it the duty of the sheriff to file a certificate of sale, in the clerk's office, within ten days after the sale takes place, yet this was merely directory to the officer, and that the omission to do so did not affect the validity of the sale. The filing of the certificate was not a condition precedent to the giving of the deed and passing the title. Where a statute required "That the panel of assize shall be arrayed for four days before the day of assize, it was held that if this was done two days before the day of the assize, it would be good as that two days were sufficient at common law.(*b*)

§ 672. In *Ex parte Heath* v. *Roome*,(*c*) the rule is again adopted that, in general, when a statute requires an official act to be done by a given day for a public purpose, it shall be construed as merely directory in regard to the time; accordingly, it was in that case held, that where ward inspectors of the city of New York were required by a statute to certify the results of the ward elections *on the day subsequent to the closing of the polls, or sooner*, their certificate was valid, although not made till the second day after closing the polls. That although a public officer neglect his duty, by allowing the precise

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(*a*) *Hooker* v. *Young*, 5 Cow. R. 269.
(*b*) See 1 Burr, 447.
(*c*) 3 Hill, 42.

time to go by, if he afterwards perform it, the public shall not suffer by the delay.

§ 673. Where a city charter required that a certain number of jurors should be chosen on the first Monday of July, and they were not chosen until the 8th of August, it was held that this provision was directory, and that a jury empannelled from a jury so chosen was a legal jury. The court said, however much the corporation ought to suffer for their own default, it would be a very harsh construction to say, that by the neglect of their officers they should forfeit their charter. This is not claimed; but it is said that they should not have a jury for that year. Suppose the common council neglected this duty intentionally, would not a mandamus lie to compel them to discharge it?—and would it be a good answer by them that the time had elapsed? May they, by their negligence or design, thus deprive the public of the right of a court within the city? Is it not incident to the enjoyment of the privileges conferred by this charter, that there should be a jury? Is it not necessary for the administration of justice according to the charter? To effect this, it is made the duty of the court of common council to nominate these jurors, and they are directed when to do it. It is said that the law is as imperative as to the time as it is as to the duty; and it is analogous to the nomination of jurors in the towns, in the month of January, for each year, which, it is said, cannot be done at any other time. There it is not confined to a single day, but may be done during the month. This fact, with the penalty for non-compliance, has been sufficient to prevent any question under the law. An omission, by one or two towns, would not prevent the accustomed administration of justice in the county; and it cannot be supposed such an omission could be general. The object, in the case before us, was to have jurors at all times when wanted. So the abstract of the

lists ought to be with the comptroller, for his use when wanted. But as there seems no particular reason to be assigned why the particular day designated by the law should be suffered to be passed over more in one case than in the other, we think the requisitions in this respect should be subject to the same construction, and both be considered as directory. After citing the case of *The People* v. *Holly*,(*a*) and the case of *The People* v. *Allen*,(*b*) with approbation, the court say, "there (that is, in the latter case) a power was given to a military officer to appoint a court-martial on or before the first of June. Here the mayor and common council are to meet and appoint jurors on or before the first of July. In each case public officers are to meet and perform official acts regarding the rights and duties of others; one regarding a military, the other a civil tribunal, to administer justice. There is nothing in the nature of the power given, or in the manner of giving it, that justifies the inference that the time was intended as a limitation more in the one case than in the other. We think, therefore, that we are bound to say, that the regular administration of justice in our cities is not to be defeated by an omission of this kind; that the time fixed for selecting jurors is merely directory, and therefore that this objection cannot prevail."(*c*) *The People* v. *Holly*,(*d*) was a case arising under sec. 67 of 1 R. S. 378, which provided, "Every person hereafter elected to the office of sheriff of any county within this state, shall, within twenty days after he shall receive notice of his election, and before he shall enter upon the duties of his office, execute, with sureties who shall be freeholders, a joint

(*a*) 12 Wend. 480.
(*b*) 6 Ibid. 486.
(*c*) *Colt* v. *Eves*, 12 Conn. R. 243 to 255.
(*d*) 12 Wend. 486.

and several bond to the people of the state, it was held that a sheriff does not lose his office by neglecting to give his official bond within twenty days after receiving notice of his election, provided that he execute and file it within fifteen days after the commencement of his term of office.(*a*)

§ 674. So it has been held,(*b*) that a school district tax was valid, though it be assessed, and the tax list thereof be made out by the trustees *after* the expiration of one month from the time of holding the district meeting at which it was voted. The statute required, and the court admitted, that the tax should be assessed, and the tax list made out by the trustees within one month after the meeting at which the tax was voted. Neither of the tax lists were made out in season; but as there were no regular words in the statute, such as would necessarily make it imperative, in such a case, for the benefit of the public, the act might be done after the time had elapsed, the statute as to time being regarded as directory only. By the 7th section of the act of 7th April, 1830, amending the charter of the city of New York, it is provided, that all resolutions and reports of committees which shall recommend any specific improvement involving the appropriation of public monies, or taxing or assessing the citizens of said city shall be published immediately after the adjournment of the board, under the authority of the common council, in all the newspapers employed by the corporation; and whenever a vote is taken in relation thereto, the ayes and noes shall be called and published in the same manner. In *Striker* v. *Kelly*,(*c*) it was held, by a majority of the court, that a resolution for the opening of a street might be passed by the common council,

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(*a*) See *Colt* v. *Eves*, 12 Conn. R. 243 to 255.
(*b*) *Gale* v. *Mead*, 2 Denio, 232.
(*c*) 7 Hill, 9.

without calling the ayes and noes—that the provision on that subject was merely directory. In this case, however, Bronson, J. dissented. The grounds of his dissent on this point were, that it was well known that men acting in a body, especially when under the cover of corporate privileges, would often do what no one of them would be willing to do if acting alone and upon his individual responsibility. They would sometimes say "aye," or permit a matter to pass *sub silentio*, where they would not venture to record their names in favor of the measure. To guard against such evils, and protect the citizens against the imposition of unnecessary burthens, it was provided by the seventh section of the amended charter, that the ayes and noes should be called and published whenever a vote of the common council shall be taken on any proposed improvement involving a tax or assessment upon the citizens. That the language was imperative. The ayes and noes *shall* be called. Where a particular mode in which a corporation is to act is thus specifically declared by its charter, he thought it could only act in the manner prescribed by law. The contrary doctrine wanted the sanction of a legal authority, and was fraught with the most dangerous consequences. It would place the corporation above the laws, and there was reason to fear that they would soon become an intolerable nuisance.

§ 675. In the marginal note to the case of *Wiggin* v. *The Mayor of New York*,(a) it is said, "It seems that the provisions of the act of April, 1830, relative to the city of New York, requiring the ayes and noes to be taken and published, is merely directory so far as relates to the publication." The chancellor, in his opinion in that case, says: "It is not necessary, therefore, that it

(a) 9 Paige, 16.

should express any opinion at this time upon the question whether the seventh section of the act of April, 1830, requiring the ayes and noes to be taken and published in certain cases, applies to this case, or whether the last clause of that section applies merely to improvements which are to be paid for out of the funds of the corporation generally, or by a tax or assessment upon the citizens at large, and not to cases where the owners of property benefited by the improvement proposed are to bear to the whole expense thereof. As that question was not argued before me, I have not examined it. But if the provision is applicable to a case of this kind, I think it is merely directory as to the *publication* of the report of the ayes and noes upon the question of the adoption of the ordinance for the proposed improvement. The neglect to make such publication did not therefore render the proceeding void if the ordinance was not void upon the face of the record of its adoption." It will be perceived that in this case the chancellor does not give any opinion in the point decided by the supreme court in the case of *Striker* v. *Kelly*, that the taking the ayes and noes was not imperative. The case of *Striker* v. *Kelly* was subsequently reversed in the court for the correction of errors;(*a*) but not upon the point as to which Mr. Justice Bronson dissented in that part of his opinion quoted above.

§ 676. For our own part, we cannot discover upon what well founded rule of construction the prevailing opinion of Mr. Justice Beardsley, in that case, in the court of dernier resort, can be sustained, unless it be upon the assumption, that although the object of the act was to attain the ends and guard against the evils alluded to in the dissenting opinion of Justice Bronson, that

(*a*) 2 Denio, 323.

end could be attained without making the act imperative in this respect. For the obvious principle that prevails in all rules of construction is, to carry into effect the intent of the legislature, and to secure the object intended to be secured by the statute. If then, the rule adopted by him would not effectuate that intent, and guard against the evils at which the act was aimed, to construe it in any other way than as imperative in this respect, would tend to defeat instead of carrying into effect the intent and object of the law-makers, and would be at war with the well settled rule of construction above alluded to. To our mind, it is obvious at least, that the surest, if not the only way of effectuating that intent, and guarding against the evils at which it was aimed, is to hold the requisition of the act as imperative.(*a*) But this opinion of Judge Beardsley seems also at war with another principle, which has long since prevailed, that a corporation is the mere creature of the statute, and is precisely what the incorporating act has made it, and can only act in the manner prescribed by the act which created it. The decision of the supreme court was reversed upon another ground, to wit, that the making of an affidavit by the collector, as required by an act of 1816, was an essential part of the power to sell, which must be affirmatively shown, and that a lease reciting that fact was not evidence of the fact that such an affidavit was made. Only two senators concurred in sustaining the prevailing opinion in the supreme court. The precise point upon which Mr. Justice Bronson dissented, has not therefore been as yet adjudicated in the court of dernier resort.

§ 677. It has frequently been held, that where a power or franchise is created by a statute, which fixes or pre-

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(*a*) See *Wheaton et al.* v. *Peters et al.*, 8 Peters, 593.

scribes the mode of its exercise, it must be exercised in the mode pointed out by the act, and in no other, and those upon whom it is conferred are confined strictly to the act creating it. This rule was admitted in the case of *Head and Amory* v. *The Providence Insurance Co.*(*a*) In that case it was held, that a corporation can act only in the manner prescribed by the act of incorporation which created it. Where its agents do not clothe their proceedings with those solemnities which are requisite by the incorporating act to enable them to bind the company, the contract was not binding upon the company. In its corporate capacity a corporation was a mere creature of the act to which it owes its existence. It was precisely what the incorporating act made it. It derived all its powers from that act, and was capable of exerting its faculties only in the manner that the act authorized. An individual had an original capacity to contract and bind himself in such manner as he pleases; but with those bodies which have only a legal existence it is otherwise. The act of incorporation is to them an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated. It is upon a principle somewhat analogous that the doctrine obtains, that a mere naked statutory power must in all cases be strictly pursued.(*b*)

§ 678. The question has been raised, whether an appointment of overseers, made after the time limited by the statute for such appointment, was valid, and that under a statute which required it to be made in a given

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(*a*) 2 Cranch, 127.

(*b*) 4 Cranch, 403; 6 id. 61; 4 Wheat. 77; 5 id. 116.

time, under a penalty, it was held that it was. The statute, in this respect, ought to have a liberal construction, because it was a statute under which provision was made for the poor. As it was not in the power of the parish to compel the justices to make the appointment within the time, the appointment ought, *ex necessitate*, to be holden good, and that although the statute was introductive of a new law, no negative ought to be implied against the meaning and justice thereof.(*a*)

§ 679. A distinction in the application of the rule in the cases cited, should be observed, that is, between cases where certain acts to be done are of the essence of the thing required to be done by the act, in which case, it is imperative : and things which are not of the essence, in the latter case, it is merely directory, and this is one of the criterions by which to determine whether the requisition is imperative or merely directory. For instance, suppose in the case of the want of notice of the annnual meeting by the clerk of a school district, the notice was a condition precedent, without which no meeting could be held, then and in that case, the thing required would have been of the essence, and the requisition imperative, and not directory merely. Or in the case of the filing of the certificate by the sheriff, if it was made a necessary pre-requisite to the vesting of the title, and without which no title could pass, unless the certificate should be filed within a certain time, then the filing within the time would partake of the essence of the thing required, and would be imperative, and in such cases the statute must be strictly complied with. Lord Mansfield says,(*b*) "There is a known distinction between circumstances which are of the *essence* of a thing

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(*a*) *Rex* v. *Sparrow*, Strange, 1123. See also *Rex* v. *Leicester*, 7 B. & C. 6.

(*b*) See 1 Burrow. 447.

required to be done by an act of parliament, and clauses merely *directory*. The *precise time* in many cases is not of the *essence*." This distinction prevailed in the case of the *Thames Manufacturing Company* v. *Lathrop*.(*a*) In that case a statue required the assessors to return an abstract of their assessment lists, on or before the 1st day of December in each year, and the question arose, whether an assessment was valid when the assessment was not returned until after the time specified in the act. The court held, that the general statute had been made for the assessment of taxes, by which assessors were to be chosen, whose duty it was to receive the list of all the inhabitants, and having perfected them by adding property omitted, by valuation of the items, and by the requisite assessments, to return an abstract of the lists to the town clerk on or before the 1st of December in each year. The lists and valuation the town clerk was directed to submit when requested to the inspection of every person liable to pay taxes. A board of relief was constituted to hear appeals from the doings of the assessors; and having given not less than ten days' notice, they were to meet on or before the first Monday of January in each year, to determine the appeals made to them. The assessment list, as annually made and corrected, was the rule for the apportionment of taxes to individuals. From this view of the law, it appeared to be a positive provision, that the lists should be returned to the office of the town clerk on or before the 1st of December in each year. This direction was imperative, and was alone alterable by the legislature. The court must take the law as they found it, and could not say that a return after the 1st of December was

(*a*) 7 Conn. R. 555.

valid, unless they assumed the character of law-makers. The reason of this legislative provision was very apparent. It was for the general benefit of every inhabitant of the towns, that each might inspect the list of his estate, and if he believed injustice done him, that he might appeal for its correction to the board of review. A time for a return of the lists should be limited, the general convenience demanded it; and that it should be sufficiently early for universal inspection, and preparation for a future hearing before the board of review was perfectly obvious. On this principle, the legislature appointed the 1st of December, as the ultimate period of the return. This branch of the law was as imperative and as unchangeable by the courts as any other; and were it within their competency, it would be as difficult to assign a period more reasonable. That the return should punctually be made was indispensable. A different principle would nullify the law, and produce the general inconvenience arising from an unlimited return. No person in such case could know when he might inspect his list; and if the return was late, no time either for reflection or preparation for a review could be had. If the legislature, in a charter of incorporation, had authorized the laying of taxes upon lists returned to a public office at a specified time, the necessity of a strict observance of the limitation would not admit of a question. The case before the court was strictly analogous to the one supposed. The general law was an enabling act to all the towns; it had prescribed the subjects of taxation and the mode; and as there was no authority to tax, except what was conferred by the law, it must be strictly observed. It had been inquired, whether the returns of the abstract of the lists by the town clerk, to the comptroller, must be by the 1st of March in each year, according to the provisions of the act in question, and if not, whether the legislature are precluded from

laying taxes upon the assessment lists? Unquestionably they were not. The case put, and the one under discussion, was in no respect analogous. The abstract assessment lists of the towns, must be strictly returned to the town clerk, or there was no legal assessment. But if a town clerk does not return to the comptroller, an abstract of the assessment lists, pursuant to the provisions of the law, the list was not invalidated, but he was subjected to a penalty.

§ 680. The principle assumed in the case last cited seems to be, that when the object contemplated by the legislature could not be carried into effect by any other construction, then the time prescribed must be considered as imperative, and the accuracy of this distinction was admitted in a subsequent case in the same court.(*a*) This may be regarded as another mode of settling the question, whether the requirements of the statute as to time in which an act is to be done, shall be deemed imperative, and is founded upon the principle of a construction in accordance with what was in the intention of the legislature; for it is to be presumed, that it intended to make such acts imperative in all cases where the object aimed at could not be obtained unless the act should be construed as imperative.

§ 681. There is another question which frequently arises, and that is, whether when an act is required to be done by a public officer, the doing of the act by such officer is essential to the validity of the law or proceedings under it. This question arose in the case of *The State* v. *Click*,(*b*) under an indictment which was found under a statute which provided: "That the secretary of state should publish the act in certain designated papers

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(*a*) *Colt* v. *Eves*, 12 Conn. R. 243.
(*b*) 2 Alabama R. 26.

for three months," and a question was made whether it was essential to the operation of the statute, that it should have been published in the manner directed. The court held, that this provision was merely directory to the secretary of state, and although it should certainly have been executed according to its letter; but even if it had been entirely disregarded, yet, as the operation of the act did not depend upon its publication, the neglect of the secretary of state to discharge this duty could not defeat the legislative will.

§ 682. An affirmative statute does not take away a custom; upon this principle it was held, in the case of *The King* v. *Pugh*,(*a*) that where the inhabitants of the Hundred of Battle, having by charter and universal custom enjoyed the privilege of not serving on juries out of the hundred, they were not to be deprived of such exemption by the several statutes respecting juries, as the words of those statutes were affirmative only. Lord Coke has carried the rule still further, and has laid it down as a rule, that a custom is good against even a negative statute, unless a new law be thereby introduced; and that upon this reason, that if the statute be only declaratory of the common law, as a man might have alleged a custom against the common law, so he may against a statute.(*b*) But this position has since been doubted, and it has since been holden that no prescription or custom is good against a negative statute, whether it be declaratory of the common law or introductive of a new law.(*c*)

§ 683. If a statute gives merely a new remedy where one existed before at common law, it is cumulative, and the party is at liberty to pursue either. So, too, if a sta-

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(*a*) Doug. R. 188.
(*b*) 1 Inst. 115.
(*c*) 1 Jan. 271; *Lovelace's case*, 2 Bulst. 36; Show. 420.

tute gives the same remedy which the common law does, it is merely affirmative, and the party has his election which to pursue. But if a statute deny or withhold the remedy which otherwise would exist at common law, the common law right ceases to exist. Thus, under the statute of Maine, it is provided that no action of trespass shall be maintained against the owner of cattle breaking into the inclosure of another through an insufficient fence, being lawfully on the opposite side thereof. It was held, that in a case within this statute, no action of trespass could be maintained; and although the statute allowed the party injured to impound or maintain trespass, that provision did not affect or qualify the prohibitory part, which denied and withheld the remedy under certain circumstances where it existed before at common law.(*a*)

§ 684. There is another class of cases which it is proper we should consider in this connection, although, strictly speaking, they are not cases presenting questions of construction merely. They present a mixed question of construction in part, and in part a question as to the appropriate remedy, in cases where a statute penalty or forfeiture is given. The latter question, arising out of facts and circumstances which are extrinsic of the statutory enactment, incidentally and not directly bearing upon the question of construction, and collaterally influencing the judgment in the decision, whether a statute penalty is to be construed to be the sole basis of an action, or whether it is to be regarded as merely cumulative.

§ 685. A distinction was made in one case between cases where the party makes an express promise to pay assessments on stock, in which case it was held that he was

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(*a*) *Gooch* v. *Stephenson*, 1 Shepley, 375.

liable to an action to recover the amount subscribed, and the forfeiture in such case merely cumulative; but that on the other hand, where one, by subscribing an act of association, simply engages to become a proprietor of a certain number of shares, without promising to pay the assessments, then the only remedy which the corporation has, is a sale of the shares to raise the sum assessed. Of the accuracy of the first proposition there can be no doubt, and the principle has been sustained by numerous decisions.(*a*)

§ 686. In Massachusetts, where the rule laid down in the case of *The Andover and Medford Turnpike Company* v. *Gould*, has prevailed and been followed in several adjudicated cases, it has been held, that where one subscribed an engagement to take a certain number of shares in a turnpike, and to pay on demand to J. G. or order all assessments, and certificates of shares were actually delivered in consequence of such subscription, which were received and retained, that an action of assumpsit for such assessments could be maintained.(*b*)

§ 687. In another case(*c*) it was also decided that a writing subscribed by the defendant, expressed as a contract, to take one share, and to pay all legal assessments, with a proviso as to the location of the road, was a personal engagement to pay assessments, which gave the corporation a cumulative remedy against the subscriber, in addition to the remedy provided by the statute to enforce payment of assessments by a sale of shares. But in another case(*d*) it was decided, upon an express promise similar to that in the case of Willard, that the de-

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(*a*) *The Andover and Medford Turnpike Co.* v. *Gould*, 6 Mass R. 43.
(*b*) *The Taunton and Boston Turnpike Co.* v. *Whiting*, 10 Mass. 327.
(*c*) *The Worcester Turnpike Co.* v. *Willard*, 5 Mass R. 80.
(*d*) *The Essex Turnpike Co.* v. *Collins*, 8 Mass. R. 292.

fendant was not liable to an action. It has been supposed that these two cases are in conflict with each other, but a careful examination of them will show that in both of them a promise to pay assessments, as well as to take shares, was considered as entitling the corporation to a cumulative and personal remedy. In the case of Willard it was conferred on the ground that he became a proprietor, in consequence of this collateral promise on his part. By his act of subscription—that is, after his subscription, to which he was invited pursuant to a vote of the corporation, and after their acceptance of his engagement, he must be understood to have received from them a certificate for the share he had subscribed, for he paid the first assessment upon it, and was therefore to be considered as having become a subscriber upon the terms proposed by his subscription. In the case of Collins, it was otherwise. After the corporation had been organized, and a part of the turnpike which was the subject of the subscription had been purchased and built, at the invitation of a person not employed by the corporation, or having no authority to engage in their behalf, Collins was induced to subscribe, upon a particular representation made to him as to what would be the effect of his engagement, and the amount of the assessments to which he would become liable. But before this proposal as it might be called on the part of Collins was accepted by the corporation, he thought fit to declare off, and he finally refused to take any certificate of shares, or to pay any assessments. The decision in this case was put upon this ground, and is not therefore in conflict with the case of Willard on the point under consideration.

§ 688. In New York the doctrine of personal liability in such cases of an express promise to pay, has been repeatedly decided. This question came before the court

at an early day;(*a*) and it was held that an express promise to pay the amount of shares subscribed in a turnpike company was a sufficient consideration upon which an action of assumpsit could be maintained. Although the act authorized the directors to call for and demand such sums so subscribed, under pain of forfeiture of their shares and all previous payments, it was held that the latter provision was designed as an additional security for the proportion of the shares which should remain unpaid, and to enable the company, by a decisive measure, to compel that prompt payment which the object of the institution required. That they had an election to adopt this expedient and exact the forfeiture, or to enforce the payment in the ordinary course by a suit on the original contract. This case was reversed in error.(*b*) The chancellor put the decision for reversal upon the ground, that in order to entitle the defendant to be considered a stockholder, the act required him to pay $10 in each share, which had not been done; and as there was no mutuality, it did not constitute a contract. That the contract, if any, was, "I agree to pay $25 for every share I acquire by this subscription;" and if none were acquired, none were to be paid for. But at the same time he held, that if the subscription had been sufficient in the first instance, that the plaintiffs might resort to their action as a cumulative remedy, and that they had their election to exact the forfeiture prescribed by the statute. That this was an affirmative statute, it prescribed a form of contract, which, if so entered into as to bind the parties at the time of the consummation, without any aid from the statute by other express provisions, would entitle the plaintiffs to maintain their ac-

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(*a*) *The Union Turnpike Co.* v. *Jenkins*, 1 Caines' R. 384.
(*b*) 1 Caines' C. 36.

tion, and that for the reason that it was a maxim in the common law; that a statute made in the affirmative, without any negative, express or implied, doth not take away the common law. The only other written opinion delivered in that case assumed the broad ground that this act was made for a particular purpose, ought to be strictly pursued, and as there was no remedy given except the forfeiture, that forfeiture was the only thing the corporation could insist upon. In a subsequent case,(*a*) which was an action upon a note given for five shares of the capital stock which was expressed upon its face, it was held that the action could be maintained, notwithstanding the remedy given in the act to exact a forfeiture of the share and all previous payments in case of non-payment. In the latter case the court admitted that the question intended to be raised in the case was whether the remedy given to the company by the statute, to exact the penalty of a forfeiture of the shares, and all previous payments, was not the only remedy. That the decision of the court of errors, reversing the decision in the case of *The Union Turnpike Company* v. *Jenkins*,(*b*) might give countenance to such an opinion; but that the court apprehended, that upon a careful examination of that case, the reversal was to be placed on other grounds, and that the reasoning and decision of the supreme court on the principal point remained good. It was to be presumed that the reversal went upon the ground assigned by the chancellor, who was then the principal law member of the court. It was therefore held that the action could be sustained; and the same doctrine was held in a subsequent case.(*c*) Thompson, J. in the case last cited, says: "Since the decision of the court in the case of

(*a*) *The Goshen Turnpike Co.* v. *Hurton*, 9 J. R. 217.
(*b*) 1 Caines' R. 384.
(*c*) *The Duchess Manufacturing Co.* v. *Davis*, 14 J. R. 244.

The Goshen Turnpike Co. v. *Hurton*,(*a*) the question whether an action could be sustained upon such a note ought to be considered at rest, at least in that court." He then took occasion to notice the decision of the court of errors,(*b*) and concluded that although one of the members of the court, in delivering his opinion, thought that the only remedy was a forfeiture of the shares and all previous payments, yet that was not the point upon which the case turned, but on the ground taken by the chancellor. The personal liability of the subscribers to an action on the subscription is adhered to in subsequent cases.(*c*) It has been held(*d*) that assumpsit could not be sustained against a putative father of a bastard for the child's support and maintenance, and that the only remedy in such cases was by proceeding under the order of the sessions in the name of the overseers. This decision proceeded upon the ground that there was no liability of the putative father at common law, and in principle does not conflict with the other decision alluded to.

§ 689. Upon the question as to whether, where one simply subscribes the act of association, merely engages to become a proprietor of a certain number of shares, without any express promise to pay the amount, any other remedy than a sale under the act of the shares could be had, there is not a uniformity in the decisions. This question was very fully and elaborately discussed by Huntington, Justice, in one case.(*e*) In that case a corporation was created by the legislature, for the purpose of constructing a railroad, with the general powers

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(*a*) 9 J. R. 217.

(*b*) 1 C. C. 86.

(*c*) *Spear* v. *Crawford*, 14 Wend. 20.

(*d*) *Moncriff* v. *Ely*, 19 Wendell R. 405.

(*e*) *The Hartford and New Haven Rail Road Company* v. *Kennedy*, 12 Conn. R. 499.

and privileges usually granted to corporations for similar purposes. The capital stock was to be $500,000, with the privilege of increasing it to $1000,000, to be divided into shares of $100 each, transferable as the bye-laws should direct. Books were to be opened for subscriptions to the capital stock. The directors were authorized to require payment of the sums subscribed to the capital stock, and in case any stockholder should neglect to make payment accordingly, the directors were empowered to sell his shares at public auction, and to apply the avails to such payment, rendering the surplus, if any, to him. A. with others, signed a writing, which after referring to the act, was in these words: "We do hereby subscribe to the stock of said railroad the number of shares annexed to our names respectively, on the terms, conditions, and limitations mentioned in the charter," he paying at the same time five dollars on each share subscribed. On a reduction and apportionment of the subscription, ten shares were allowed to A. who received the company's certificate thereof, specifying the sum paid, and declaring the residue to be payable by instalments, as they should be ordered by the directors. Subsequent instalments were required by the directors, which A. refused to pay. In assumpsit brought by the company against A. for such instalments, it was held, 1st. That from the relation of stockholder and company thus created, a promise by the defendant was implied to pay the instalments in question; 2d. That the remedy provided by the clause authorizing a sale of the stock of delinquent stockholders, was cumulative merely, leaving such promise in full force. The first position maintained in this case, seems founded upon the well settled principles which have governed all the decisions allowing a recovery in such cases, and is not in fact in conflict with any of them. The defendant resisted payment on the ground that he had made no promise, express or im-

plied, and that the only remedy of the plaintiffs, on his failure to comply with the order of the directors, was to sell the stock and apply the proceeds to the payment of the instalments which were due. On the first ground of defence, the court thought an obligation to pay was created, and that the law would enforce it. That it was true a promise to pay, in precise terms, did not appear to have been made. The defendant had not affixed his signature to an instrument which contained the words, *I promise to pay*, but he had done an equivalent act. He had contracted with the plaintiffs to become a member of their corporation, and to be interested in their stock to the extent of one hundred dollars for each share assigned to him, if that amount was required. The contract had been executed on the part of the plaintiffs. The shares which he had agreed to take, and for which a certificate of stock had been delivered to him, were part of a monied capital. They were to be paid for in money, and by voluntarily becoming a member of the corporation, under the provisions of the charter, an implied assumpsit arose to pay the instalments on the terms, conditions, and limitations mentioned in the charter. This was apparent from the object for which this corporation was created, and the several provisions in the act. The court then proceeded to consider those objects, and the several provisions of the act, for the purpose of, and as we think, clearly deducing from them, clear and satisfactory evidence of an evident intent on the part of the legislature to hold the subscribers personally liable on their subscription for their stock. In answer to the second ground of defence, that the 13th section, which gave authority to sell the shares of negligent stockholders, was the only remedy which could be pursued, and excluded the responsibility which the common law would have otherwise implied; the court after reciting the provisions of the statute, said, "The po-

sition advanced and applied to this case was, that where a statute gives a new power, and at the same time provides the means of executing it, those who claim the power can exercise it in no other way. If a power is created in the plaintiffs to direct the instalments to be paid, they can enforce the payment in the method directed by the act of incorporation, and not otherwise; and that method is by a sale of the delinquent shares. The court admitted that such a position was stated in several cases decided by the supreme court of Massachusetts, and was supposed to be the basis of several decisions by that court, in which it had been held, that where certain corporations were created with powers and privileges, and subject to duties contained in the statutes defining the general powers and duties of such corporations, and where the only remedy provided by the statute for the collection of the assessments upon the shares, when payment was neglected, was by a sale of them, unless there be an express agreement to pay. That these precedents had been followed by the supreme courts of Maine and New Hampshire, but they were far from being satisfied that they were applicable to this case." They then proceeded to review the cases upon this subject, and the distinctions between some of them and the one under consideration, and to deduce from them the rule which should be applied in cases arising under this and other acts.

§ 690. As the decision in that case clearly defines the line of demarcation between instances where the remedy under the statute may be regarded as cumulative, and those where it is the only remedy, we deem it advisable to advert to it somewhat at length. After alluding to the decision in the case of *The Andover and Medford Turnpike Co.* v. *Gould*;(*a*) it held that the words of the sta-

(*a*) 6 Mass. R. 43.

tute under which that case arose, were not as strongly indicative of the intention of the legislature to create a personal obligation to pay the assessments as those of the 13th section of the plaintiffs' charter. They gave no authority in terms to *demand* payment, nor did they refer to the assessment as a *debt due* and recoverable. They rather implied, that no debt was intended to be created by becoming a stockholder, and that if a tax was assessed it was to be collected only by a sale of the shares. But in the act then in question, express authority was given to demand and require payment of instalments. They are considered as debts due and unpaid, and the neglect or refusal to discharge the obligation authorized the use of the additional remedy of a sale of the shares. It was also supposed that other broad lines of distinction existed between the act which had received a judicial construction in the first case cited from Massachusetts, and the act then in question. It was understood, that in the former, the amount of the capital to be invested was not fixed by the legislature; it was, to some extent at least, dependent upon the will of the corporation. The power to make assessments was not expressly given by the act defining the general powers and duties of turnpike corporations, but was only implied from the authority given to sell the shares of delinquent proprietors.(*a*) The discretionary power of these companies to create a large or a small capital, as their interest might require, coupled with the fact that the power to order any assessment, arose solely by implication from the authority given to make sale of the shares, might possibly justify the inference that the legislature considered such sale as an adequate remedy to recover the assessments. The shares were not valued

(*a*) 6 Mass. R. 43.

at any given sum in the Massachusetts act. They were not a part of any definite, fixed capital, required by law. No assessment could be made upon them, by virtue of an express statute enactment. The corporation had power to agree upon a tax of the shares of the proprietors; but this power was only inferred from the authority given to sell on failure to pay the tax. When, therefore, the legislature had not thought the public interest, or the just rights of third persons required the creation of a certain capital, but left the amount optional with the company; and when they had given no other authority to raise a capital in money, (independent of the payments voluntarily made by the proprietors,) than by sale of the shares of delinquent stockholders; it was not, perhaps, very unreasonable to give such a construction to their statute as would confine the company to the exercise of the power expressly given. The power to assess was inferred from the power to sell, and the latter might therefore be considered as the only mode in which the former, for any practical purposes could be exercised. It might be said with some plausibility, that no general rule would be more just, or better adapted to carry into effect the intention of the legislature, than that which should declare that when an authority to impose a tax was derived solely by implication from the power to sell the shares, on failure to pay the tax, every other mode of collection was excluded, when there was no express promise to pay. In such a case, it might be said, the intention would be manifest to make the amount of capital paid in dependent upon the will of the stockholders or upon the sale of the shares; that the proprietor did not incur a personal obligation to pay any thing, but the company were clothed with authority to raise the necessary funds, by a sale of the stock, upon the neglect of the stockholders to pay the just and equal assessments laid upon it. In this view,

the assessment might be considered as made upon the stock merely, and the remedy in the nature of a proceeding *in rem*. Such would seem to be the import of the language used in some of the cases referred to.

§ 691. In one case,(*a*) the court, commenting on the cases cited by counsel from Esp. Dig. 7, to sustain the position that if a person becomes a member of any society or company, he thereby agrees to abide by all legal claims arising against him from the bye-laws or local regulations of that society to which he belongs, said: "In the cases cited from Espinasse, the penalties or assessments were set upon the *persons*, not upon the *shares*, as is the case under our statutes." Shaw, Ch. J. says: "The individual liability of stockholders, created by the statute of 1808, was of a particular and limited character, and could only be enforced in the manner pointed out in the statute. It did not subject a living stockholder to a general liability for assessments, but only authorized the company to sell the shares for payment of the assessments. *By operation of law, the assessment is a lien upon the share.* The share is in the same condition with any other pledged property."(*b*) The same judge, in another case, uses similar language: "The only compulsory mode which a manufacturing corporation has, to enforce the payment of assessments, is by sale of the share. *By law, the assessment was a lien upon the share.* The executor has an option to redeem the share for the benefit of the estate, by paying off the assessment, as he would have to redeem any other pledged property; and this option he will exercise according to his views of the interest of the estate." A similar distinction was taken between assessments upon the person and upon the stock

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(*a*) *Franklin Glass Co.* v. *White*. 14 Mass. R. 286.

(*b*) *Ripley* v. *Sampson et al.* 10 Pick. 371.

or property, in the case of *The Trustees of the Congregation in Hebron* v. *Quackenbush*.(*a*) In that case the pew on which the assessment was made had been sold to the defendant free from rent, and the pews were sold at a high price in consequence of this exemption. The statute vests the possession of the church in the trustee, and gives them power to "regulate and order the renting of the pews therein. About six months after the sale of the pews, the congregation passed a vote that if any assessment was made on the pews, and it remained unpaid for one month, the pews should be sold for the benefit of the congregation. No promise of the defendant to pay rent was shown; but he continued to be a member of the congregation, and occupied the pew he had purchased, and the action was brought to recover his proportion of the salary of the minister, assessed by the plaintiffs on all the pews. The court, in giving judgment for the defendant, say: "Whether the assessment of the pew rent was a valid assessment, we need not now inquire, for the defendant is not chargeable, in this case, upon the implied assumpsit to pay, in consequence of the occupation of the pew. The trustees have no power to make and levy personal assessments, and the owner of the pew is not liable *in personam*, unless there be some special ground from which to infer a contract and promise to pay. That the facts in this case were not sufficient to furnish such an inference."(*b*)

§ 692. Huntington, J. in the cases cited from 12 Conn. Rep. 499, says: "We are confirmed in the suggestions we have ventured to make touching the decision in Massachusetts, by adverting to the language of Sewall, Ch. J. in *Phillips' Limerick Academy* v. *Davis*,(*c*) referring

(*a*) 10 Johns. R. 217.

(*b*) See *Cutler* v. *Middlesex Factory Co.* 14 Pick. 483.

(*c*) 11 Mass. R. 113.

to the cases decided by the supreme court of that state, in which it was held that no implied obligation on the part of the corporators to pay their assessments arose from their being voluntarily members of the corporation. He says: 'It is said that these decisions were upon the ground of another remedy provided by the legislature in the act of incorporation. But that was not the sole ground, if it was in any respect a reason for those decisions.' And upon no other principle than that the payment of the assessments was *intended* to be enforced only by the sale of the stock, inasmuch as the power to assess was implied merely from the power to sell, can we consider the remarks of the court in *The Andover and Medford Turnpike Corporation* v. *Gould*(*a*) as having any just application. 'Persons not interested in having the turnpike, either from their situation or private property, may be requested to associate and become corporations. They may not be able to judge of the probable expenses or profits; but if they know that the assessments become grievous, they may abandon the enterprise by suffering their shares to be sold—they may, on this principle, join the association.' This language, upon the supposition that no personal liability was *intended* to be imposed upon the proprietors, would be consistent with the good faith and moral honesty due to the creditors of the corporation." He held, that if the charter then in question was compared with the provisions of the Massachusetts act, as stated in the reported case, a wide difference would be perceived between them. In their charter, the amount of the capital was not made to depend upon the caprice or voluntary act of the corporation. It was fixed at "five hundred thousand dollars, with the privilege to increase to one million of dollars, to be divided

(*a*) 6 Mass. R. 40.

into shares of one hundred dollars each." The company was vested with all powers, privileges and immunities which were or might be necessary to carry into effect the purposes and objects of the act, and was empowered to purchase, receive and hold such real estate as might be necessary and convenient in accomplishing the object for which the incorporation was granted. A certain definite capital was created by the act, such as was deemed requisite to ensure the completion of the work and the faithful performance of the contracts of the corporation. Ample provision was made that this capital should not be merely nominal, but real. For this purpose, subscriptions were authorized to be received under such regulations as the persons named in the first section of the act might adopt. The directors were authorized to require payment for the stock at such time or times, and in such proportions and upon such conditions, as they should deem fit. They were also authorized to sell the stock of delinquent stockholders; and a forfeiture of the charter was incurred if one hundred thousand dollars was not expended upon the railroad within four years, or the road was not constructed, completed and put into operation within six years after the passage of the act. In all these provisions great solicitude has been manifest to secure the public interest, the rights of creditors, the usefulness of the corporation, and the just expectations of stockholders. A capital sufficiently large was required to be created. The payment of so much as was necessary to insure the completion of the work within a reasonable time, and to discharge all its debts, was enforced by the authority given to require payment of the instalments, to sell the shares of negligent proprietors, and by the forfeiture of the charter, if the commencement or completion of the undertaking was unreasonably delayed. It was true the payment of the assessments

were dependent upon the action of the directors. They might limit the actual capital to a less sum than five hundred thousand dollars, if the whole amount was not wanted for the object; but no just fears were entertained that their duties to the public, the corporation and third persons would not be discharged. In that charter, the authority to demand payment for the stock was not merely *implied* from the power given to sell; it was given in express and explicit terms—"the directors may require the payment of the sums subscribed to the capital stock," &c. The power to sell was additional to the power to demand payment, and was not the only power expressly given. Hence no inference could be deduced that the exercise of the authority to sell was the only means intended to be provided to secure the payment of the capital stock. The subscriptions to the stock were not like those to the turnpike stock in Massachusetts,—an engagement to take a certain number of shares of uncertain value, in a company without any fixed capital,—but an engagement constituting the subscribers stockholders in a company with a specified capital, the shares of a certain determinate value, and creating an obligation on them to comply with all the terms, conditions and limitations mentioned in the charter, one of which gives authority to demand of them the payment of instalments as they should be ordered by the directors. The form of the certificates issued by the corporations in Massachusetts did not distinctly appear from the reported cases. In the case then under consideration, a certificate was issued and delivered to the defendant, in which it was expressed that the residue of the sums due for the stock was payable by instalments, as might be ordered by the board of directors. After a careful examination of the decisions to which the attention of the court had been called, they inclined to the opinion that the decision

first made,(*a*) and which was subsequently followed in the other cases cited, supposed to be similar, might be maintained upon principles which were wholly inapplicable to the case then before them, and therefore ought not to be regarded as a precedent.

§ 693. We cannot review all the cases on this point, as the limits of our work will not admit of it. From the cases cited on the question under consideration, and which have elicited much able discussion in the courts of several of the states of the Union, we think we may safely declare, as in accordance with the weight of authority, the following propositions: 1. That where the act itself, and the proceedings which are had under it, do not vest in the subscriber a vested right in the stock, so as to make him a member of the corporation, with a right to enforce his corporate rights as against the corporation itself; in such cases the remedy prescribed by the statute is not cumulative, but is the only remedy to be pursued. 2. That where the act itself, *ex vi termini*, by the bare act of subscription, makes the party subscribing one of the corporators, and vests absolutely in him the shares subscribed for, subject to payment therefor; that in such cases it becomes an executed contract, upon which a common law remedy might be enforced. That in such cases the statute remedy may be regarded as merely cumulative, and the corporation in such cases has an election either to pursue the common law remedy or that given by the statute.

(*a*) 6 Mass. R. 40.

CHAPTER XVI.

OF EQUITABLE CONSTRUCTION.

§ 694. The design of the present chapter is, to consider the nature and illustrate the principles of the doctrine of equitable construction, define the limits to its application, the exceptions and qualifications of the rule in the construction of statutes.

§ 695. The word equity, as used among judicial writers, has a two-fold signification. It is taken at large, or in general, for that natural justice which distributes right to all men indiscriminately, without regard to persons, or it has a more contracted signification, to wit, that justice which takes off from the rigor and severity of the written law, supplying by fair and reasonable interpretation what the lawgiver must be understood to have intended himself; but either was not able, or did not think proper to express. It is with the latter definition that our treatise stands connected, and not with the former. It may be said in general, that equitable construction consists in deciding according to the will or supposed intention of the lawgiver, in matters which he was not able or willing to express, or in restraining the words of the law, where it is clear that they were not intended to extend to a particular act or thing. This rule presupposes that all human laws may be defective, either against the design or inclination of the law-maker, or without his consent. By the former we are to understand, things which the legislature would have defined and ascertained, had it known of their existence; by the latter, those things which the

legislature, by reason of the universality of the law, for want of time, or precision, could not descend to a particular enumeration of them.(*a*)

§ 696. By equitable construction, as anciently understood, was meant a judicial interpretation of a statute which, presupposing the legislature to have intended what is right and just, pursues and effectuates that intent. The Aristotelian definition of equity is: "The nature of equity is, the correction of the law where it is defective by reason of its universality."(*b*) This definition seems to meet with the approbation of Puffendorf,(*c*) and is adopted by Grotius.(*d*) Wooddeson considers this thought as very sagacious, worthy of its great author, and gives us a clear elucidation of it. According to this author, by *universality* is meant, that the law deals in general expressions, at least so far general, as to include some cases within the words which are not within the reason or the spirit of its coercion, and to omit other cases which required the like provisional institution. For this reason, it is impossible for any premeditation to discover, or ever so voluminous a code to express that endless series of complicated occurrences which may vary the moral fitness of applying positive ordinances. In all such instances the law, or rather the words of it, are defective, that is, in the original language of the Aristotelian definition, "ελλειπει," it leaves out something which it is the province of equity to supply. Under such circumstances, the judge should inquire what the lawgiver, as an upright man, would have decreed, if the very case then in question had fallen within his foresight and contemplation. Grotius in his treatise

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(*a*) Taylor's Civil Law, 91, 92.
(*b*) Arist Eth. Nicom. lib. 5, c. 10.
(*c*) Jur. Nat. et Gro. lib. 5, c. 12, sec. 21.
(*d*) Grotius de Equitate, c. 1, sec. 3.

"*De Equitate*," thus enforces the necessity of thus recurring to equitable interpretation: "*Cum enim inæqualibus*," says he, "*idem non possit esse æquale res autem sæpe sunt inæquales, lex vero una semper atque eadem, necessario consequitur, alia virtute opus esse quæ inæqualibus rebus suam cuique æqualitatem præstat unde hæc virtus equitas Latinis, Græcis vero* επιεικεια *dicitur.*"

§ 697. Equity, therefore, regarding the intent and not scrupulously fettered by the letter of the law, has to this end a two-fold operation; sometimes abridging the comprehensiveness of the text, and sometimes extending the words so far as to include other cases within parity of reason. An instance of the former kind may be found in one of the earliest English reports.(*a*) The case was this, an old act of parliament provided that goods rescued from a ship, where there is no legal wrecker, should be delivered by the sheriff to safe custody, in order to their being claimed within a year and a day, yet if the goods are perishable, and the sheriff sells them, retaining their value in their stead, restrictive equity (abridging the comprehensiveness of the text, which happened not to make due provision for perishable commodities,) would lead the mind of the judge to the conclusion that the sheriff retaining their value in their stead, would be acting agreeable to the intention of the lawgiver, inasmuch as he evidently designed the benefit of the trading owner.

§ 698. On the other hand, instances of the latter kind occur in those cases, "*Ubi lex est specialis, et ratio ejus generalis, generaliter est accipienda.*"(*b*) Thus we find

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(*a*) Plow. 465, 466, cited and approved in *Threadneedle* v. *Threadneedle*, 1 Freem. 185; 3 Keb. 381.

(*b*) 2 Inst. 43, 83; *Beaufage's case*, 10 Co. 103, b.; 2 Inst. 118; Dig. L. b. 10, 27.

that two ancient statutes respecting executors, although administrators were not named, were held to extend to administrators; on the ground, that no possible reason could be suggested why they should be exempt from the same provisional regulation.(*a*) By parity of reasoning, in divers statutes where the word *persons* is used, it has been held that the word includes *corporations*, although this is a much larger sense than the word bears in ordinary conversation.(*b*)

§ 699. It will be well in this connection to advert to another part of the Aristotelian definition of equity, viz. "*the correction of the law.*" It must be considered, that this "*correction*" is not by way of *control* but of *exposition*. It does not *impugn* but *promotes* the meaning of the law. For if the law, understood according to the unquestionable intention of the legislature, has descended to particulars, has described the very subject-matter under consideration, it cannot be said in such a case to be defective, nor in such case is there any room for equitable construction, or any warrant or authority for that kind of judicial redress, although the court may indeed doubt how far the ordinances of a particular statute are consonant to natural equity; yet it by no means follows, that they can with propriety assume, that it ought not to be obeyed, where it is not plainly subversive of some principle of natural justice—of divine or moral obligation; and even then it has been held by some, that it is rather a matter of private conscience, remote from the office of a judicial magistracy, than within the province of the court, which is constituted to declare and not to alter or impugn the law. "*Perquam durum est, sed ita lex scrip-*

(*a*) *Hill* v. *Grange*, Plow. 178; *Eyston* v. *Studd*, 2 Plow. 467; Hard. 211, 213; 1 Hale P. C. 653, 654; Woodd. Lect. 7, p. 116.

(*b*) Bac. Us. 57; *Magdalen College case*, 1 Mod. 164.

ta est,"(*a*) is the popular phrase of Ulpian, in a case where the terms were sufficiently explicit to exclude that equitable construction which reason would have otherwise dictated.

§ 700. Wooddeson thus illustrates this rule: "By another Roman law, a minor was not to be entrusted with his property till he had completed twenty-five years of age. Let us suppose that a guardian, six days only before the appointed period, transferred to his ward the management of his estate, who squanders the patrimony by profuse misconduct, it is not likely that the young heir would, during those six days, have acquired a much greater maturity of discretion; yet Harmenopulus writes, that the guardian is responsible for the dissipated wealth. The law is sufficiently explicit; there is no unforeseen exigence of peculiar circumstances; and if the opinion of the legislator himself could be demanded, he would probably answer, that his intention was to prohibit, and not to allow, every guardian to estimate the discretion of his ward." "A judge is not to make a parade of greater humanity than the law."(*b*) It seems also, that the early Athenians entertained a general notion of this rule of judicial equity, as supplemental to their written laws. For their judges were sworn to administer relief according to the laws, where the laws were *particularly explicit;* and in other cases, to award the most equitable sentence. Although these general principles, thus clearly expressed by the early ethical and judicial writers, were not originally used in reference to statutes, strictly so to speak, yet it will be seen, in the progress of the present chapter, that from them, have been borrowed some of the important general rules of construction which are

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(*a*) Dig. xl. ix. 12, 1.

(*b*) Nov. lxxx. c. 10; Thuc. lib. 1, c. 84.

now adhered to, and laid down in our most modern law reports.

§ 701. In more modern times, the rule seems still to prevail that statutes are many times to receive what is termed an equitable construction—that is, a construction that may sometimes seem contrary to the letter; which rule has for its reason, that a thing within the intention is as much within the statute as if it were in the letter, and the principle is still recognized that this rule proceeds upon the ancient ground that the lawgiver could not set down every thing in express terms, so as to meet the varied exigencies of human affairs; and hence courts, whenever they discover a thing within the mischief which it was the intention of the statute to remedy, hold that such things must be considered as within the statute.(*a*) So, on the other hand, when a case arises which it is clear that it is out of the mischief intended to be guarded against—or, in other words, out of the spirit of the statute—the letter of the statute will not be deemed so unequivocal as to elude any other construction.(*b*) This rule obtained in a case in the courts of New York.(*c*) The statute prohibited any sheriff or other officer, to whom any execution should be directed, or any of their deputies, or any person for them, or either of them, to purchase any goods, or chattels, lands, or tenements, at any sale, by virtue of any execution, and declared all purchases made by them, or any of them, or for the use of them, or any of them, void. The premises in question, in that case, which was an action of ejectment, had been sold by one deputy sheriff on an execution issued under a judgment owned by another deputy of the same sheriff, and were bid off by a third

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(*a*) 1 Inst. 19.

(*b*) *Faw* v. *Masteller*, 2 Cranch, 10.

(*c*) *Jackson* v. *Collins*, 3 Cowen R. 85.

person in his own name; but in fact, as it was claimed, for the deputy who owned the judgment, and were subsequently deeded to him by the purchaser. It was contended, that as the purchaser was trustee of the deputy, and purchased the lands for his benefit, the purchase was void. Savage, Ch. J. held, although the purchase came within the letter of the act, it could never have been the intention of the legislature to have prevented a deputy sheriff, when plaintiff in an execution, from bidding, in order to secure his money. The object was to *prevent abuse*, that the sheriff or his deputy should not be allowed to become purchasers at their own sales, and thereby be induced to conduct corruptly in relation to them. But it never was intended to place those persons in a worse situation than others, as to the collection of their own demands. That "whenever the intention of the makers of a statute can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seem contrary to the letter of the statute. A thing which is within the letter of a statute, is not within the statute, unless it be within the intention of the makers.(*a*) If from the view of the whole law, or from other parts *in pari materia*, the evident intention is different from the literal import of the terms employed to express it in a particular part of the law, that intention should prevail for the reason, that in fact, is the will of the legislature.(*b*)

§ 702. Some of the English authorities have laid down the rule that all acts, private as well as general, shall be taken by a reasonable construction. Indeed, in this country the doctrine has obtained that an instrument no less

(*a*) Bac. Abr. Statute I.; *People* v. *Utica Ins. Co.* 15 J. R. 380; *The King* v. *Younge*, 5 T. R. 449; *Rex* v. *Cox*, 2 Burr, 786; *Canal Co.* v. *Railroad Co.* 4 Gill & J. 6; Plowden, 18; 3 B. & A. 266; 4 B. & A. 212.

(*b*) *The United States* v. *Fisher*, 2 Cranch, 399.

solemn and sacred than that of the federal constitution, and that too on a question of *power*, like every other grant, must have a reasonable construction, according to the true import of its terms; and where a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grows out of the contract, or by necessary implication, for the reason that the constitution, like statutes, necessarily deals in general language. It was impossible, as well as unsuited to the purposes of the people, to provide for minute specification of power in this great charter of their liberties.(*a*)

§ 703. The English rule is, that the intent and meaning of the legislature must be found partly from the words and partly from the mischief which the statute was intended to remedy; as that *intent* is the controlling principle, sometimes it becomes necessary to expound it against the letter, in order to preserve the interest. As the reasons which induced the law-makers to make an act which took away or altered the common law, is the principal thing to be considered in connection with the words of the act itself, courts may in doubtful cases enlarge the construction of an act, according to the reason and sense of the law-makers, which are expressed in other parts of the statute or general acts by considering the frame and design of the whole;(*b*) and as that intent is rather to be weighed many times, it will be found that things which are in the letter are not within the purview of the law, which extends no farther than the intent of the makers.(*c*)

§ 704. The spirit, as well as the letter of a statute,

(*a*) *Martin* v. *Hunter's Lessees*, 2 U. S. Cond. R. 583.
(*b*) 11 Mod. 160.
(*c*) 19 Vin. Abr. 519.

must undoubtedly be respected; and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, in that case some degree of implication may be called in to aid that intent.(*a*) But this rule only obtains where the intent is not plain, and must be ascertained.(*b*) The intent must be sought for in the words, and where the intent is apparent on the face of the act;(*c*) where there is no obscurity in the meaning, obscurity must never be created by construction.(*d*) The supreme court of the United States have held, "It is undoubtedly true it is the duty of the court to ascertain the meaning of the legislature from the words used in the statute, and the subject-matter to which it relates, and to restrain its operation within narrower limits than its words import, if the court are satisfied that the literal meaning of its words would extend to cases which the legislature never designed to include in it.(*e*)

§ 705. The English rule adopted by ancient authorities is, that no statute, when the letter is ambiguous, should be taken by equity contrary to the letter, so as to maintain a thing or mischief contrary to the letter or intent, the very object of the statute being to toll the mischief or inconvenience, but that in such cases it should be taken in the letter and intent, so as to destroy the mischief or inconvenience.(*f*) As the necessity of an equitable construction originates in the difficulty of so framing a statute as to comprehend and provide for

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(*a*) *Durrousseau* v. *United States*, 6 Cranch, 307, 314.

(*b*) *United States* v. *Fisher*, 2 Cranch, 358.

(*c*) 7 Cranch, 52; 2 Pet. 662.

(*d*) *Camden and Amboy Railroad Co.* v. *Commissioners of Appeal*, 3 Harrison R. 72.

(*e*) *Lessees of Brewer* v. *Blougher*, 14 Pet. 178.

(*f*) 19 Vin. 527.

every possible case within its scope and design;(*a*) and as the words of the law, according to their strict and literal meaning, may in a particular instance lead to the subversion of the intention and principles of it, and produce manifest injustice, either by comprehending cases to which its principles do not extend, or by not embracing cases where the intention of it was to give relief, an equitable construction must sometimes be adopted.(*b*)

§ 705. It may not be amiss, in this connection, to advert once more to the understanding of judicial and ethical writers as to the nature of equitable construction, the extent to which it is to be carried, and the rules that should govern in its application. To this end the pathway of the legal student may be somewhat illuminated by lights derived from ancient civil law writers, as well as by the principles evidently deduced therefrom by more modern legal writers, and expressed in judicial decisions.

§ 706. Grotius seems to have adopted substantially the definition of Aristotle as to the equity required in such cases. He says: "Equity is an accurate interpretation by means of which that which is defective in the law by reason of two general terms, whenever it is perceived is rectified." Puffendorf's explanation of this definition is, "that a true equitable construction consists in showing by principles of natural good sense, that a particular case is not comprehended in the meaning of a law, because if it were so comprehended, some absurdity would necessarily follow," and he illustrates this rule by the case supposed by Cicero, in his treatise *De Inventione*, where it was forbidden by the law to open the gates of the

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(*a*) L.10 ff. De legb.

(*b*) Grotius Dr des Guene et de La Paix. L. ii. 16, sec. 27; Puff. Dr des Gens, b. 1, c. 11, sec. 8; 1 V. C. 12, sec. 21; Black. Com. b. 3, 429, 430; Woodd. Lect. 7.

town during the night, a man opened the gates at night for the purpose of admitting troops to succor the town, when they would have been cut to pieces if they had been suffered to remain without the walls until morning. In this case it is perfectly clear, although the act was within the letter of the law, the law-makers never could have intended that this law should apply to such a case.

§ 707. St. Germain says: "In some cases it is necessary to leave the words of the law, and follow that which reason and justice requireth, and to that intent equity is ordained; that is to say, to temper and mitigate the rigor of the law, and so it appeareth that equity taketh not away the very right, but only that which seemeth to be right by the general words of the law."(*a*) Domat adopts the general rule, that courts should not, in the construction of a law, mitigate the hardships or rigor of it whenever it is evident that such rigor is essential to the law from which it flows, so that no temperament can be applied to it without annulling it.(*b*) Domat illustrates this principle by a reference to those laws which require certain formalities in the execution of last wills and testaments, but which formalities from the happening either of some unforeseen event, or through mistake or accident, have not been complied with. In such case, the will must always be held null, whatever certainty there may be of the will of the testator, or however favorable the contents of the testament may be. The principle in such case is founded upon the reason that these formalities are the only ways which the law allows, and hence the rigor of the law, which annuls wills when these formalities have not been observed, is

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(*a*) Doct. and Stud. 1, c. 16.

(*b*) Domat's Civil Law, b. i. tit. i. sec. 2, p. 10. IV.

required, and is essential to the law itself, founded as it is upon principles of public policy, which cannot be mitigated without subverting those principles, and quite annulling the law itself.(*a*) But in those cases where the hardship or rigor of the law be not the necessary consequence of, and inseparable from it, but the law itself may have effect, by an interpretation which mitigates its rigor; courts may, as the spirit of the law requires, depart from the rigor which the letter of the law seems to demand, and follow rather its spirit and true intendment rather than adhere to a strict and rigid interpretation.(*b*) We have seen that he is of the opinion that we cannot lay down any general rule of universal application, either that the rigor of a law ought always to be followed contrary to the temperament of equity, or that it ought always to yield to equity. For this reason, the rigor of a law becomes injustice in those cases where it will admit of an equitable construction, and on the other hand it is a *just* rule in those cases, when an equitable interpretation would destroy or annul the law itself.

§ 708. Thus it will be seen, that according to this great civilian, "the rigor of the law," must be taken either for a hardship which is unjust and odious, for the reason that it is in no way conformable to the spirit of the law, or on the other hand, for a rule which is *inflexible*, but which has nevertheless its principles founded on substantial reasons and strict *justice*. In the former case it may be mitigated, but in the latter it should not. This certainly is a very palpable distinction, and one

(*a*) Domat's Civil Law, b. i. tit. i. sec. 2, p. 10, IV. See 3 Har. & McHen. 457.

(*b*) Domat's Civil Law, b. i. tit. i. sec. 2, p. 10, V.

which should ever be kept in view, in cases where an equitable interpretation is to be resorted to. He thinks that the rule of an equitable construction manifestly applies in all that class of cases where the words of the law do not expressly comprehend some cases which cannot, without absurdity, be excepted from its operation.

§ 709. Fret, in his commentaries on the Pandects, says, "That things which are not expressly specified by the law, must be supplied by means of interpretation by the jurisdiction of judges, proceeding on the manifest meaning of the law, to cases similar to those provided for according to the letter of the law, whenever the principles and reason of the law apply.(*a*) Mr. Dwarris says, "Whatever doubts may be entertained of the propriety of extending the words of a statute by equitable construction to embrace other cases,—conveyances,—times,—places,—persons,—and things,—besides those contained and expressly mentioned in the act, there can be no question that the words of a remedial statute are to be construed largely and beneficially, so as to suppress the mischief and advance the remedy. It is by no means unusual, in construing a remedial statute, to extend the enacting words beyond their natural import and effect, in order to include cases within the same mischief."(*b*) Stephens says, "That is true with us of remedial statutes only, which Cicero says of all laws, *eas ex utilitate communi non ex scriptione, quæ in literis est interpretari.*"(*c*)

§ 710. Lord Erskine's rule was, that where the strict

(*a*) Domat, 4, c. iv. prelim., secs. 1, 21, LX. ff. de leges, I. XII., eod. i. xxxii. ff. ad 4 Aquil. Eng. Constitution, by Bowyer, 28.

(*b*) Dwarris, 735; 2 Y. & J. 196.

(*c*) 1 Steph. Elec. L. 28.

letter of the law was contrary to its spirit or to equity, judges ought not so much to regard the proper or received signification of the words, as that meaning which appeared most consonant to the design of the law.(*a*) And he bids fairest for a just interpretation who keeps constantly in view, the mischiefs or defects which existed in the former laws on the same subject, the remedies which the statute has provided to cure them, how far those remedies are proper, and what sense appears the most consonant to the subject-matter, and most agreeable to equity.(*b*)

§ 711. An inattentive reader, in perusing the works of some elementary writers, might be led from their writings to suppose, that a distinction exists between the powers of a court of equity and a court of law in the application of the doctrine of equitable construction. But it will be found no such distinction exists. We have stated the rule adopted in such cases in a previous chapter.(*c*) We have shown that in those states which have separate courts of law and equity, the same rules of construction prevail in each; or if they differ it is only as one court differs from another.

§ 712. The rule of an equitable construction of a statute has frequently been adopted in this state, and the reasons for it adverted to. It came under consideration in the case of *The Mayor, &c. of New York* v. *Lord*,(*d*) in the court of dernier resort. The chancellor, in speaking of its necessity, says: "The imperfection of human language, and the different modes of expression in use amongst different individuals, even in the same state or government, to convey their ideas, wishes, or intentions, to the minds of others, renders it morally impossible that

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(*a*) Erks. Inst. b. i. tit. i. sec. 52.
(*b*) Ib. sec. 58.
(*c*) See ante, § 635.
(*d*) 18 Wend. 131.

the language of any general legislative provision, which is intended to govern in future cases, can be made so certain and explicit as not to admit of a doubt as to its proper interpretation or legal construction, when it is afterwards to be applied to the peculiar circumstances of some cases, which may arise and be brought before the judicial tribunals in reference to such statutes. For this reason it has been found necessary to establish a system of legal *hermeneutics*, or fixed principles of interpretation, and construction of legislative enactments, to ascertain the intent and meaning of the lawgiver. For similar reasons, certain fixed rules of judicial construction are resorted to by courts of justice, for the purpose of giving a proper construction to the terms of a grant from the government, or from a private person, the meaning of a testamentary disposition, or the true interpretation of words which parties have used in a written contract. Among these fixed principles or rules for the interpretation or construction of statutes, which has been adopted in this country and England, is that of construing the statute by equity, so as to produce neither injustice nor absurdity, where the language of the statute is such as to admit of different interpretations or constructions." The learned chancellor then adopts the rule of Lord Eskine, above stated by us.

§ 713. In this case, the question arose under the provisions of 1 R. L. 1813, p. 368, sec. 81, which provided, that when any building or buildings in the city of New York should be on fire, the mayor, with the concurrence of two aldermen, might direct and order the same, or any other building which they may deem hazardous, to be pulled down or destroyed. The act further provided, that upon the application of any person interested in *such building* so pulled down or destroyed, to the mayor, recorder or any two aldermen; it made it their duty to call a jury to inquire of and assess the damages which

the *owner* of *such building*, or any person having any estate or interest *therein*, had sustained by the pulling down or destroying thereof. During the great fire in December, 1835, a building owned by Rufus L. Lord, and occupied by David N. Lord as tenant for a year from the 1st May, 1835, had been destroyed by being blown up by the order of the mayor and two aldermen, to prevent the spreading of the conflagration. At this time the tenant, D. N. Lord, had a large amount of goods in the building, which were also destroyed with the building. The tenant applied, under the act, for a jury, who assessed the damage of the owner of the building at $7,168 50, and of the tenant as lessee, and for the goods, at $156,274 80. By the terms of the act, the damages assessed were to be paid by the city in full satisfaction of all demands of such persons, by reason of the pulling down and destroying of the building. The main question involved in the case was, whether, under the statute, the *tenant*, who did not *own* the *building*, was entitled to the indemnity of the act. The supreme court, 17 Wend. 285, Bronson, J. dissenting, had decided he was, which decision was under review in the court for the correction of errors. This case affords another illustration of the application of the rule of an equitable construction. The chancellor held, in this case, (and his opinion prevailed,) that in relation to the question then under consideration, the defects in the common law were, that where it might become necessary for the officers of the corporation to destroy the property of an individual to prevent the ravages of a fire, no provision was made for compensation to the individual whose property was taken for the benefit of others. Although the legislature seemed to have supposed that it was only necessary to give the officers of the corporation a discretionary power to pull down or destroy *buildings* to arrest the progress of a fire, it could hardly be

presumed that they did not intend to extend this protection to the officers, as well as the compensation to the individuals whose property was taken or destroyed, to all cases of destruction which were a necessary consequence of a correct and judicious exercise of the power expressly given by the statute. The terms of the act appeared sufficiently broad to give to the owner or lessee of the building an assessment of all damages he had sustained by the pulling down of the building, without giving him an opportunity to remove his goods therefrom. In such cases the loss of the goods might as legitimately be considered as damages sustained by the destruction of the building as the loss of the building itself. Both were equally within the spirit and equity of the statute. Thus, by an equitable construction, he gave to the tenant the benefit of this act.

§ 714. Although it is undoubtedly true that judges, when interpreting the law, are to explore the intent of the legislature, yet it is equally true that the construction to be put upon an act, must be such as is warranted, or at least not repugnant to the words of the act. Where the object of the legislature is plain, and the words of the act unequivocal, courts ought to adopt such a construction as will best effectuate the intention of the law-makers; but they must not, even in order to give effect to what they may *suppose* to be the intention of the legislature, put upon the provision of a statute a construction not supported by the *words*, even although the consequences should be to defeat the object of the act.(*a*)

§ 715. Where the legislature have used words of plain and definite import, it would be dangerous to put upon them a construction which would amount to holding

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(*a*) *Rex* v. *Stake Damerel*, 7 B. & C. 569; Dwarris, 702.

that the legislature did not mean what they had clearly expressed. The fittest course in all cases where the intention of the legislature is brought in question, is to adhere to the *words* of the statute, construing them, according to their nature and import, in the order in which they stand in the act, rather than to enter upon an inquiry as to the *supposed* intention.(*a*) Neither are courts to presume the intention of the legislature; but they are to *collect* them from the *words* of the act. Dwarris hath with great propriety said, "This is the true sense in which it is so often impressively repeated, that judges are not to be encouraged to direct their conduct 'by the crooked cord of discretion, but by the golden metwand of the law.'" That is, not to construe statutes by equity out of the words of the act or irrespective of them, but to collect the sense of the legislature by a sound interpretation of the language, according to reason and grammatical correctness.(*b*)

§ 716. Great caution should be used in the adoption and application of an equitable construction, lest judges should usurp legislative authority, and make, instead of expounding statutes, in the exercise of too unlimited judicial construction. In modern times, both in this country and in England, courts have felt the danger of giving too great a latitude to this species of construction, as well as the necessity of limiting its exercise to only those cases which are most clearly within the spirit of the rule, and about which there could be no propriety of its application to each particular case.

§ 717. Mr. Justice Chase, in *Priestman* v. *United States*,(*c*) remarked, that "by the rules which are laid down in England for the construction of statutes, and the latitude which has been indulged in their application,

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(*a*) 6 B. & C. 712. (*b*) Dwarris, 703. (*c*) 4 Dallas, 30.

the British judges have assumed a legislative power, and on the pretence of judicial exposition, have in fact made a great portion of the statute law of the kingdom. Of these rules of construction, none can be more dangerous than that which distinguishes between the intent and the words of the legislature, which declares that a case not within the meaning of the statute, according to the opinion of the judges, shall not be embraced within the operation of it, although it is clearly within the words; and *vice versa*, that a case within the meaning, though not within the words, shall be embraced. Sitting in an American court, he should always deem it a duty to conform to the expression of the legislature to the letter of the statute, when free from ambiguity and doubt, without indulging in speculation either upon the impropriety or hardship of the laws."

§ 718. Mr. Justice Bronson, in his dissenting opinion in the case of *The Mayor, &c. of New York* v. *Lord*,(*a*) held, that very great license had sometimes been taken in the construction of statutes, and they had been extended by equity so as to include cases which seemed far enough from the declared will of the legislature. It had been said, "Judges have liberty and authority over laws, especially statute laws, according to reason and best convenience, to mould them to the truest and best use."(*b*) And this was said for the purpose of justifying diverse expositions of the self same words and sentences. This, he thought, was occupying dangerous ground. He agreed that we might go beyond the letter, for the purpose of carrying into effect the intent of the lawmakers, but we must in general be able to collect that intent from the statute itself, though we may sometimes resort to the cause or occasion of its enactment,

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(*a*) 17 Wend. 304. (*b*) Hob. 346.

for the purpose of arriving at a just conclusion.(*a*) We are not at liberty to act upon the *supposed* intention of the legislature.

§ 719. In the case of *Stone et al.* v. *The Mayor of New York*,(*b*) involving the construction of the same statute which was involved in the case of *Lord* v. *The Mayor of New York*, it was attempted in this case, to carry the construction of this statute so far, as to entitle the lessee of a building destroyed by order of the mayor, &c., to recover damages for merchandise destroyed (with the building) which did not belong to the lessee, but was the property of others, in his possession as a factor, or merely on storage. But the court for the correction of errors refused to do so. In this case, in a prevailing opinion, it was held, that the doctrine of the right and duty of courts to give to a statute an enlarged construction, even in direct violation of the language used, but according to the probable or presumed intention of the legislature, had been maintained and applied to this act. There was much high authority for judicial extension or alteration of the meaning of statutory language, in almost as great a latitude as had been contended for in this case, and it might be found in judicial decisions as well as the reasonings and opinions of learned judges and commentators. The experience of later years had taught courts the danger of excess in bold interpretation, according to the presumed intent and against the plain language of acts. The ablest and safest judges had borne testimony against the evil of the ancient decisions in this spirit. It was the duty of judges to interpret and apply the provisions of statute laws, and not to supply their real or *supposed* defects, or to carry out and apply their *presumed* policy. However rigidly courts might

(*a*) 15 J. R. 358. (*b*) 25 Wend. 177.

adhere to this intention, there would often be necessity for great latitude of interpretation. This arose in no small degree from the necessary imperfection of human language, and the various senses in which words or phrases were used, even by the most careful writers. But legislative language was liable to greater incongruity from the manner in which acts were often framed in numerous bodies, where amendments by one hand were often engrafted upon bills prepared by others, and sometimes with a different intent and spirit. Thus statutory language might be not only obscure but contradictory. Then the necessity of the case imposed on courts the duty of gathering the intention as they best could, from the whole legislative expression of the will taken together, and not from single, isolated, or detached sentences. The legitimate power of judicial construction of legislative language, beyond or contrary to its accustomed meaning, was confined to cases in which the words used were either doubtful or ambiguous in themselves, or contrary to other parts of the same act and its avowed object, or else to some clear, well settled principle of constitutional right, such as the legislature could not be presumed to have meant to oppugn, or where the act would not have been valid had they so meant. In such cases, especially the last, the adoption of unusual and even strained senses of words or phrases, had often been resorted to, and this seemed justifiable, so long as the construction, though less natural and obvious, was still within some reasonable meaning of the language of the statute. If courts were ever authorized to go beyond these limits, it would only be done where there was some acknowledged rule of justice or right wholly independent of the statute, to which its provisions failed to give effect. Where there was such a previous right, for securing and enforcing of which no legal remedy had beeen provided, and where it could be enforced by statu-

tory construction without injustice to other parties, such a latitude of interpretation, or rather of application, might be regarded as a strictly judicial act, applying a general principle of justice in a manner pointed out and approved by the legislature as to similar subjects. But when a statute rests upon legislative discretion alone, or judgment upon public policy, then, any assumption by courts, varying, abridging, or extending the clear provisions of a statute, upon the ground of carrying out the policy or intention of the enacting body, appeared to be a usurpation of power, transgressing the fixed boundaries between the judicial and legislative authority. Whatever may have been the policy or excuse in other countries or in older times, for such bold construction or alteration of legislative language, with us it was in hostility to the genius and spirit of our republican institutions, which aimed at laying open to every citizen, as far as possible a knowledge of his duty and his right. The statute books, and the laws of our annual legislation would become, under such an arbitrary system of determination, not merely a sealed book to the private citizen, or the inferior magistrate, but they were calculated to lead into constant error, when the language of the legislative, even where apparently the most simple, direct, intelligible and technical, could be construed in a precisely contrary sense as to its legal effect. The rule that restricted courts to the interpretation of the statute, and inhibited them from altering or amending it on any assumed equity or supposed legislative policy, was the rule of well regulated republican liberty, as well as that of justice and reason.

§ 720. Lord Chief Justice Tenterden(*a*) says, "there is always danger in giving effect to what is called the

(*a*) 6 Barn. & Cress. 475.

equity of the statute, and it is much safer and better to rely on and abide by the plain words, although the legislature might possibly have provided for other cases, had their attention been directed to it." Butler, Justice,(*a*) says, "we are bound to take an act of parliament as they have made it; a *casus omissus* can in no place be supplied by a court of law, for that would be to make laws.(*b*)

§ 721. The plain and literal meaning of the language of a statute should never be departed from, unless there be strong evidence that the meaning of those who framed it was different from that which its language imports.(*c*) It seems that other judges in England have not been insensible to the dangerous consequences of the application of this rule. Chief Justice Willis, in one case, held, that where the words of an act are doubtful and uncertain, in such case it was proper to inquire what was the intention of the legislature; but that it was very dangerous for judges to branch out too far, in exploring into the intent of the legislature, when they have expressed themselves in plain words.(*d*) Indeed, this opinion has become so prevalent in England, it is said that recently English judges frequently observe, in answer to remarks of counsel, that the legislature intended so and so—that they had not, in the particular statute then under consideration, so expressed themselves, and therefore the maxim applies *quod volint non dixit.* Chief Justice Denman(*e*) declared, that where he found the words of a statute perfectly clear, he should adhere to them. Lord Tenterden, in one case, also says: "Our

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(*a*) 1 Term R. 52.
(*b*) See also per Bronson, J., 17 Wend. 304.
(*c*) *Clark* v. *People*, 26 Wendell, 599.
(*d*) Plowden, 57.
(*e*) 4 Neville & Manning, 460.

decision may perhaps, in this particular case, operate to defeat the object of the statute, but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the act, in order to carry out what we may suppose to be the intent of the legislature."(*a*) In another case the same learned judge said: "The words may probably go beyond the intention, but if they do, it rests with the legislature to make an alteration. The duty of the court is only to construe and give effect to the provision."(*b*) Mr. Justice Ashurst, in a judgment on the game laws, has said: "It is safer to adopt what the legislature have actually said. The heir apparent may have qualified upon the supposition that the esquire was so already. I cannot suppose it was their intention to exclude the father, but in fact they have done it."(*c*)

§ 722. In a case of goods forfeited to the Bishop of Durham, in an action charging the sheriff of the county palatine of Durham with having removed the goods of a tenant from the premises in his occupation, without having paid the landlord one half year's rent then due, according to the form of the statute of 8 Anne, c. 14, Lord Tenterden said: "The process under which the sheriff seized and sold the goods in question, was not process of execution on a judgment—it was not, therefore, within the words of the statute. But it was said it was within the equity; but speaking for myself alone, I cannot forbear observing that I think there is always danger in giving effect to what is called the equity of the statute, and that it is much safer and better to rely on and abide by the plain words, although the legislature might have possibly provided for other cases, had their attention been directed to them." Bailey, J. said: "I cer-

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(*a*) *Rex* v. *Bolton*, 8 B. & C. 104.
(*b*) *Notley* v. *Buch*, 8 B. & C. 160.
(*c*) *Jones* v. *Smart*, 1 T. R. 52.

tainly think that the present case comes within the mischief intended to be remedied by the statute of 8 Anne, c. 14, sec. 1, and I should have been better satisfied if it could be brought within the fair construction of the words of that enactment. But I think we should be attributing too comprehensive a meaning to the words of the statute. Holroyed, J. said: "This case does not appear to have been contemplated by the legislature, although it may perhaps be within the mischief which they intended to remedy by 8 Anne, c. 14."(*a*) Mr. Dwarris says: "The result is, that to bring a case within the statute, it should be not only within the mischief contemplated by the legislature, but also within the plain, intelligible import of the words of the act of parliament."(*b*)

(*a*) *Brandling* v. *Barrington*, 6 B. & C. 475.
(*b*) Dwarris, 711.

CHAPTER XVII.

OF EQUITABLE CONSTRUCTION OF PENAL STATUTES.

§ 723. In the preceding chapter we considered the doctrine of equitable construction generally. In the next succeeding chapter we shall proceed to the consideration of the rules of construction which prevail in reference to penal statutes. The design of the present chapter will be to consider how far equitable construction may be applied to penal statutes. We start with the position, that as a general rule, penal statutes are to be construed strictly. A penal statute is one which imposes a penalty or forfeiture for the doing or omitting to do a given act. By penal statutes, strictly speaking, are meant not only such as impose a penalty or forfeiture on such as transgress the provisions therein contained, but also such as give a summary remedy in derogation of the common law, or in derogation of rights of property, or one which takes away the estate of a citizen, or imposing disabilities upon persons. It is important, in the outset, that we should clearly understand the reasons why a penal statute should be construed strictly. Under the civil law, the distinction, as we have seen, was between things odious and those not odious. At common law it seems to be that the law does not allow of constructive offences or of arbitrary punishment; hence it is highly proper that it should be a fundamental rule that no man shall incur a penalty, unless the act which subjects him to it is clearly both within the letter and spirit of the statute imposing the penalty. It has been

very justly remarked by an English jurist, that if these rules are violated, the fate of accused persons is decided by the arbitrary discretion of judges, and not by the express authority of law.(*a*) It is not, however, always true that all statutes of a penal character are to be regarded as exclusively penal, for a penal statute may also be a remedial law,(*b*) or it may be penal in one part and remedial in another.(*c*)

§ 724. In the application of the rules of construction to statutes which partake of this two-fold character, it is of great importance to keep this distinction in view, and to discriminate between the parts of a statute which are penal and those which are remedial. It has been said that in England an act of parliament that only gives a remedy to the party aggrieved, shall not be construed as a penal statute.(*d*)

§ 725. Another limitation of the rule that penal statutes are to be construed strictly, should also be observed, which is, that while they are to be strictly construed, yet they are not to be construed so strictly as to defeat the obvious intention of the legislature, and the words are not to be so narrowed down as to exclude cases which those words, in their ordinary adaptation, or in that sense in which the legislature obviously used them, would comprehend.(*e*) But in order to authorize a detemination that a case is within the intention of the legislature, the language used must clearly anthorize the construction. For it would be an extremely dangerous and unjust rule to carry the principle, that a case that is within the mischief of a statute is

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(*a*) *Best*, J. *Fletcher* v. *Lord Sanders*, 3 Bing. 580 ; 1 Stev. Elec. L. 29.
(*b*) 3 Wils. 126.
(*c*) Day, 702.
(*d*) 1 Wils. folio, 412 ; see also Black. R. 1226.
(*e*) *The United States* v. *Wiltberger*, 5 Wheat. 76 to 94.

within its provisions, so far as to punish a crime not enumerated within the statute, because it was of equal atrocity, or of a kindred character with those named in the act, or to apply a penal statute to previous acts, unless such construction was unavoidable from the language used.(*a*) Hence the rule that penal statutes are to be construed strictly, means simply this—that they ought not to be extended, by their spirit or equity, to other offences than those which are clearly prescribed and provided for. But this rule does not prevent an inquiry by the court into the intention of the legislature.(*b*) No court ought to conjecture that an act not expressly forbidden, and which is in itself innocent, might be a preliminary step to a violation of the law, and ought therefore to be punished, for the purpose of affecting the legislative intention ; such a construction would transcend the powers of a court, and would be creating instead of applying a rule already made.(*c*)

§ 726. The rule that penal statutes are to be construed strictly when they act on the offender, and inflict a penalty, admits of some other qualifications. In the construction of statutes of this description, it has often been held that the plain and manifest intention of the legislature ought to be regarded : a statute which is penal to some persons, provided it acts beneficially generally, may be equitably construed, even in cases of felony, courts have regarded the intention of the legislature. Hence, where an act is couched in general terms in the plural, it has been held to include a thing in the singular number of the same denomination as is stated in the act. An instance of the kind has obtained under the statute of Geo. 2, which enacted that it should be

(*a*) See *The United States* v. *Hall*, 6 Cranch, 171 to 174.
(*b*) *The Enterprise*, 1 Paine C. C. R. 32.
(*c*) See 7 Cranch, 61.

felony to steal any bank notes. On an indictment under this act, it has been adjudged felony to steal one bank note. Viner says: "The rule that penal statutes must be construed strictly, may be adopted with this qualification, "that it does not apply to those cases where the object of the statute is to prevent a *general mischief*, although it may be held good in cases of laws that are penal as to particular persons, but not if made for the public good and the peace and safety of the realm;"(*a*) and this qualification of the rule seems to have been recognized, in principle, in the decision of our own courts in several cases. In *Sickles* v. *Sharp*, hereafter referred to, it was distinctly recognized. Woodworth, Justice, in the case of *The People* v. *Bartow*,(*b*) says, "That although a penal statute is to be construed strictly, the court are not to disregard the plain intent of the legislature. Among other things, it is well settled that a statute which is made for the *good of the public* ought, although *penal*, to receive an equitable construction. In Vaugh. 179,(*c*) the rule is also recognized that statutes that are made for the public good are to be so expanded as to attain their end."

§ 727. In the case of the *Schooner Harriet*,(*d*) Mr. Justice Story laid down the rule, that penal statutes were to be construed strictly, and cases within the like mischiefs are not to be drawn within a clause imposing a prohibition or forfeiture, unless the words clearly comprehend the case; yet all the provisions thereof must be taken together, and interpreted according to the import of the words, and not by the mere divisions into sections, so as to give effect to the object and intent of the statute. And that all statutes relating to the same subject-matter

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(*a*) 19 Vin, 521.
(*b*) 6 Cow. R. 293.
(*c*) 1 Strange, 253, 258.
(*d*) 1 Story, 255.

are to be interpreted together, and such a construction is to be given to them, consistent with the words, as will avoid the mischief and promote the object and policy contemplated by the statute. If a clause is found in one section, which in its general language and import is equally as applicable to other sections and provisions of the same act, as it is to the very section in which it is found; if the main objects of those sections, and the true intent and policy of the act will be best promoted, by reading it as applicable to all those sections, and if further mischiefs equally within the scope of the statute, would be thereby prevented, and upon a different construction those mischiefs would be left without redress, there is certainly very strong ground to say, that the clause ought to be so construed as to suppress the mischief, and not to promote or protect them. Where the language was appropriate, it should be construed as intended to include them. Where the public mischief was the same, and the words were sufficient to cover all the cases, it would be against all just rules of interpretation to confine the language to one case only.

§ 728. In another case the same judge laid down the rule thus: "We are undoubtedly bound to construe penal statutes strictly, and not to extend them beyond their obvious meaning by strained inferences. On the other hand, we are bound to interpret them according to the manifest import of the words, and to hold all cases which are within the words, and the mischiefs to be within the remedial influences of the statute."(*a*) In the case in which he thus laid down the rule, he says, that the object of the law was to prevent frauds upon the revenue, and it was upon this ground that he was not at liberty to narrow the words so as to save from

(*a*) *The Schooner Industry*, 1 Gallison, 117.

their operation a case, also fully within the mischiefs which the legislature designed to remedy. In reference to the doctrine that penal statutes are to be construed strictly, the same learned judge, in another case, said, "I agree to this rule in its true and sober sense, and that is, that penal statutes are not to be enlarged by implication, or extended to cases not obviously within their words or purport. But where the words are general, and include various classes of persons, I know of no authority which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief which is to be redressed by the statute is equally applicable to all of them. And where a word is used in a statute, which has various known significations, I know of no rule that requires the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me, that the proper course in all these cases is, to search out and follow the true intent of the legislature, and to adopt that sense of the words, which harmonizes best with the context, and promotes in the fullest manner, the apparent policy and objects of the legislature. The most restricted sense, then, is not, as a matter of course, to be adopted as the true sense of the statute, unless it best harmonizes with the context, and stands best with the words and with the mischief to be remedied by the enactment.(*a*)

§ 729. The case last cited, arose under an indictment against the master of a ship for having from malice, and without justifiable cause, on the high seas, beaten and imprisoned one J. B., one of the crew, against the statute 3d March, 1835, c. 40, sec. 5. The third section

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(*a*) *The United States* v. *Winn*, 3 Sumner, 211.

of the statute provided, "That if any master or other officer of any American ship or vessel on the high seas, or within any other waters within the admiralty and maritime jurisdiction of the United States, shall from malice, hatred, or revenge, and without any justifiable cause, beat, wound or imprison, any one or more of the crew of such ship or vessel, or withhold from them suitable food and nourishment, or inflict upon them any cruel or unusual punishment, every such person so offending shall, on conviction thereof, be punished by fine not exceeding, &c., or by imprisonment not exceeding, &c., or by both according to the nature and aggravation of the offence." The question presented for the consideration of the court was, whether the offence when committed by the master upon the chief or other officer of the ship, was an offence within the purview or intent of the statute. In other words, whether the word "crew," in the section, was used in contradistinction to other officers of the ship, and so including the common seamen or mariners only, or whether the word "crew," in the sense of the statute, embraced all the officers except the master, as well as the common mariners. It was held that it did include all except the master. Mr. Justice Story, after laying down the rule in the language above quoted, says: "Now the word 'crew' has several well known significations. In its general and popular sense it is equivalent to company. He then proceeded to cite several authorities to show that such was its popular meaning. He then adds:—The general sense of the word 'crew' being then, as I think, equivalent to ship's company, which, it can scarcely be doubted, embraces all the officers as well as the common seamen; that sense ought not to be displaced unless it is manifest that the legislature have used the word 'crew' in a more restrictive sense; and this must be ascertained, either from the context, or from the object to be accomplished by

the enactment. Now in examining our laws upon maritime subjects, it will be found, that the word 'crew' is used sometimes in the general sense above stated, and sometimes in other senses more limited and restrained. It is sometimes used to comprehend all persons composing the ship's company, including the master; sometimes to comprehend the officers and common seamen, excluding the master; and sometimes to comprehend the common seamen only, excluding the master and officers. But in these two last clauses, I think upon close examination it will be found, that the context always contains language which explains and limits the general to the particular sense." After referring to other provisions of the statute, for the purpose of ascertaining the true sense of the word as intended by the legislature, he says:— "Upon the whole, after much deliberation upon the subject, I adhere to the construction which was stated to the jury at the trial. I think the word 'crew' was intended to include the officers as well as the common seamen; and that the section uses the word as equivalent to ship's company. In this view it is used in the same sense as it is in the first and second sections of the act; and for purposes equally important to the due protection of all engaged in the maritime service, and equally necessary for the safety and security of the voyage."

§ 730. It has been held, that courts are not to narrow the construction of penal statutes, but are to give effect as near as may be, to the plain meaning of words, and where they are doubtful they are to adopt the sense that best harmonizes with the context, and the apparent policy and object of the legislature.(*a*) In the case of *Rex* v. *The Inhabitants of Hodnett*,(*b*) it was held, that bas-

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(*a*) *Pike* v. *Jenkins*, 12 N. H. R. 256.
(*b*) 1 D. & E. 96.

tards were within the meaning of the marriage act, 26 Geo. 2, c. 33, which required the consent of the father, guardian, or mother, to the marriage of persons under age, who are not married by banns; and that there was no reason to except illegitimate children, for they were within the mischiefs intended to be remedied by the act. Buller, Justice, in that case said: "It is not true that the court, in the exposition of penal statutes, are to narrow the construction. We are to look to the words in the first instance, and, where they are plain, we are to decide on them. If they be doubtful, we are then to have recourse to the subject-matter; but at all events it is only a secondary rule. Now these words are very general. The act speaks of all persons, except under particular circumstances. Then does this come within any of the exceptions? If it do not, it falls under the general regulations established by the act. Besides, the rule that a bastard is *nullius filius*, applies only to the case of inheritances; it was so considered by Lord Coke." Mr. Justice Woodbury, in commenting upon the rule that penal statutes are to be construed strictly, says; "But this rule of construction, if we recur to the principles upon which it is founded, appears often to have been misapplied to statutes, and should generally be confined to the declarations on penal statutes, and to the evidence adduced in support of the declarations." In a subsequent part of the same decision he adds: "A statute, if of public utility, as is the uniform presumption, should be so construed as to effectuate the intention of its makers. This intention, to be sure, must be gathered from the language and subject-matter of the statute. But when once so gathered, it is no less important to society, and no more severe upon the offender to enforce it in penal statutes than in remedial ones. Indeed society at large have often more interest in a liberal extension of some penal statutes, and in those merely

penal, not including such as inflict corporeal punishment, the offender has often less at stake. Without such a construction too, this class of statutes become almost a dead letter, prosecutions are a mockery, and malefactors encouraged."(*a*) In *Powlter's case*,(*b*) Lord Coke observes: "It is frequent in our books, that penal statutes have been taken by intendment, to the end they should not be illusory, but should take effect according to the express intention of the makers of the act;" and in Plowden,(*c*) "it was the opinion of all the justices that though things which do not come within the words 'of penal statutes,' shall not be taken by equity, 'yet' the words of them may be construed beneficially, according to the intent of the makers thereof. It is also said the rule that penal statutes are to be construed strictly, when they act upon the offender and inflict a penalty, admit of some qualifications. In construction of statutes of this description, it has been often held, that the plain and manifest intention of the legislature, ought to be regarded; a statute which is penal to some persons, provided it is beneficial generally, may be equitably construed; even in cases of felony courts have regarded the intention of the legislature."(*d*)

§ 731. It has also been held that revenue laws for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not, in a strict sense, penal acts, although they impose a penalty, but ought to be so construed as most effectually to accomplish the intention of the legislature in passing them, instead of being construed strictly in favor of the defendant.(*e*) So, too, statute against frauds are generally

(*a*) *Fairbanks* v. *The Town of Antrim*, 2 N. H. R. 105.
(*b*) 11 Co. 34.
(*c*) Page 86.
(*d*) *Sickles* v. *Sharp*, 13 J. R. 198.
(*e*) *Taylor et al.* v. *The United States*, 3 How. R. 197.

considered as remedial, and are to be liberally and beneficially expounded. This rule has sometimes been thought contradictory to the rule we have been considering, as most of these statutes are, in their consequences, penal. There is an important distinction, however, which should be taken into consideration, that where the statute acts upon the offender and inflicts a penalty, such as imprisonment or fine, it is in this respect penal, and the old authorities were that it must be construed strictly.(*a*) But where it acts upon the offence, as by setting aside the fraudulent transaction, in this respect it is remedial. The rule that statutes against frauds, when they operate upon the offence, are to be liberally construed, so as to avoid the transaction, is recognized in other cases.(*b*)

§ 732. Although statutes which are made with the view of providing for divesting one of his estate, are to be construed with the same degree of strictness as are penal statutes, yet it has been held, in construing statutes giving powers which are to be applied to great public objects, depending for their success upon the judgment of the officers entrusted with their execution, and in whom there must of necessity be large discretionary power, the interpretation should be liberal. But this rule has been placed upon the ground that they partake of a remedial character. While, on the one hand, these statutes are to be regarded as remedial acts, intended to carry into execution important equitable provisions in favor of private rights, on the other hand they are not to be so construed as to embarrass or defeat their purpose.(*c*) Although it is true that statutes in derogation of a common law right, or which abridge the liberty of the subject, are, as

(*a*) 1 Kent, 465 ; 1 Burrow, 274.
(*b*) Dudley, Geo. R. 182.
(*c*) *Tide Water Canal Co.* v. *Archer*, 9 Gill & J. 479.

a general rule, to receive a strict construction, and courts have no right to extend them beyond the plain meaning of the words,(*a*) yet even in these cases, as in cases of penal statutes, the evident intent of the legislature ought not to be departed from by a too forced or over constrained construction.(*b*)

§ 733. By penal statutes, strictly speaking, are meant, as we have seen, such as impose a penalty or forfeiture on such as transgress the provisions of them. It by no means follows, however, that every statute wherein a penalty or forfeiture is annexed to an act or an omission to act is a penal act, as a penal statute may be penal in one part and yet be a remedial law in another.(*c*) Very different rules of construction may prevail when interpretation is to be applied to a statute of this two-fold character, from that which would be applied to one solely of a penal nature. Hence it always becomes a matter of inquiry which particular provision of a statute partakes of the nature of a penal or of a remedial law. The rule generally stated in a previous section obtains that a statute which only gives a remedy to a party aggrieved, by way of increased or aggravated damages, is not to be considered as a penal law.(*d*)

§ 734. The distinction between a statute wholly penal and one which is partly penal and partly remedial, is important, inasmuch as the same words in the same statute have in some instances been held to bear a different determination, dependent upon the nature of the suit in which the rule of construction was to be applied. Thus, under the statute of the 9th Anne, ch. 14, against gaming, which enacts that if any person shall lose, at any one time or sitting, £10, and shall pay it to the winner,

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(*a*) Vaugh. 179 ; 4 Bing. 183.
(*b*) 14 Pet. R. 464 ; 8 Mod. 65.
(*c*) 1 Wils. 126; Day, 702.
(*d*) 1 Wils. part 1, fol. 412.

he may recover it back in three months; and if the loser should not, within that time sue for it, any other person may sue for it and treble value besides; the judges held, in a case where an action was brought by the loser to recover fourteen guineas, which had been won and paid after a continuance at play, except at an intermission during dinner, that the statute was remedial so far as to prevent the effects of gaming without inflicting a penalty, and therefore in this action they would consider it one time or sitting. But if the action had been for the penalty, they would have construed it strictly, and held that the money had been won at two sittings. The same principle has been recognized in this country. Thus, in *Barnabus Palmer* v. *The President, &c. of York Bank*,(*a*) in an action by an individual under a statute which gave to the party injured four times as much damages as is allowed by law for the detention of the debt, although it was penal in its nature, as the damages are given to the party injured, who ought to recover a just debt, to which the incurred damages were made an incident; a suit, therefore, was not to be regarded as properly a penal suit, the statute being a remedial law.(*b*)

§ 735. Chancellor Kent(*c*) recognizes this distinction, and says that "statutes against fraud are generally considered as remedial, and are to be liberally and beneficially expounded. The latter rule has sometimes been thought to be contradictory, as most statutes of this character are in their consequences penal. There is an important distinction, however, which should be taken into consideration, that where the statute acts upon the offender, and inflicts a penalty such as imprisonment or fine, it is in this respect penal, and the old authorities were that it

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(*a*) 18 Maine, 166.
(*b*) 13 Pick. 96.
(*c*) 1 Kent Com. 465.

must be construed strictly.(*a*) But where it acts upon the offence, as by setting aside the fraudulent transaction, in this respect it is remedial, and should be construed liberally."

§ 736. A statute which is purely remedial ought always to receive such a construction as to suppress the fraud or mischief, and so as to attain its ends, for such a construction is for the furtherance of justice.(*b*) It is by no means unusual, in construing such a statute, to extend the enacting words beyond their natural import, in order to include cases in the same mischief. An English author lays down the rule, that whatever doubts may be entertained of the propriety of extending the words of a statute by equitable construction, to embrace cases, conveyances, times, places, persons and things, besides those expressed in the act, there can be no question that the words of a remedial statute are to be construed largely, so as to suppress the mischief and advance the mischief.(*c*) Professor Dane admits this rule, and assigns, as a reason therefor, that this is necessary to guard against the subtle delays and evasions for private advantage, and to give life and strength to the remedy, according to the true intent and meaning of the makers of the law *pro bono publico*.(*d*)

§ 737. Chancellor Walworth, in the case of *Cole* v. *Savage*,(*e*) applied this rule in a case arising under the statute against usury, where the words of the act, in their strict and restrained sense, only applied to the borrower. He held, that there was no reason why the rules which controlled the construction of remedial

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(*a*) 1 Burrow, 274.
(*b*) Dane Ab. 600; 2 Dwarris, 715; 2 Y. & J. 196.
(*c*) 1 Stew. El. C. 28.
(*d*) 6 Dane Ab. 600
(*e*) MSS. Dec. March, 1844.

statutes in general should not be applied to the provisions of this act, in carrying out the provisions which the legislature had so explicitly declared. He said: "It was true the word borrower alone is to be found in this section; and if the statute is to be construed literally by restraining the term 'borrower' to the particular individual to whom the loan was actually made, the remedy which the legislature intended to give to a complainant who came into this court for relief against usurious security, will not benefit either the surety of the borrower, or his grantee, or heirs, or devisees, or personal representatives. It was impossible to believe that such could have been the intention of the legislature. He had no doubt the new principle declared by the legislature must be extended to a complainant claiming under and in privity with the original borrower. A remedial act was to be construed liberally to carry into effect the intention of the legislature, and may be extended by construction to other cases within the same mischief, though not within the words of the statute." Numerous cases are to be found in which remedial statutes have been held to extend to other persons or other things than those expressly mentioned in the statute, where the principle of the statute and the mischiefs intended to be remedied was equally applicable to them.(*a*) The statute of 9th Rich. 2, ch. 3, which gave a writ to the reversioner, upon a recovery against a tenant for life, tenant in dower, tenant by the courtesy, or tenant in tail, after possibility of issue extinct, was held to extend to a remainder-man, although the reversioner alone was mentioned.(*b*)

(*a*) Reilway's Rep. 96; 1 Coke R. 256; 1 Plow. Rep. 36; Coke's 2 Inst. 43, 152, 382.

(*b*) *Winchester's case*, 3 Coke R. 4.

CHAPTER XVIII.

OF THE CONSTRUCTION OF PENAL STATUTES.

§ 738. PENAL statutes are to receive a strict interpretation. Under the denomination of penal statutes, within this rule, are included not merely such as inflict a penalty, or which *ex vi termini* work a forfeiture, but it extends to statutes which give a summary remedy,(*a*) or those made in favor of corporations, or individuals, in derogation of common right,(*b*) or those made in derogation of the common law,(*c*) or in derogation of rights of property, or disability of persons, or that takes away the estate of a citizen,(*d*) or statutes which impose restrictions upon trade or common occupations, or which levy an excise or tax on the citizen,(*e*) or a statute introductive of a new principle of common law.(*f*) The rule that penal statutes shall be construed strictly, is subject to some qualifications; they should not be construed against the manifest intention of the legislature, or so as to involve an absurdity.(*g*)

(*a*) *Bennet* v. *Ward*, 3 Caines' R. 259.

(*b*) *Sprague* v. *Birdsall*, 2 Cowen R. 419.

(*c*) *Melody* v. *Read*, 4 Mass. R. 471; *Gibson* v. *Jenny*, 15 id. 205; *Commonwealth* v. *Knapp*, 9 Pick. R. 496; *Wilbur* v. *Crane*, 13 id. 284; *Lock* v. *Miller*, 3 Stew. & Port. 13.

(*d*) *Sharp and others* v. *Spier*, 4 Hill's R. 76; *Smith* v. *Spooner*, 3 Pick. R. 229; *Wales* v. *Stetson*, 2 Mass. R. 146; 9 Gill & J. 479.

(*e*) *Sewall* v. *Jones*, 9 Pick. R. 412.

(*f*) *Eayre* v. *Earle*, 3 Halstead, 359.

(*g*) *Commonwealth* v. *Loring*, 8 Pick. R. 370; *Read* v. *Davis*, id. 514; *Melody* v. *Read*, 4 Mass. R. 471; *Broadwell* v. *Conger*, 1 Penn. 210.

§ 739. The general words of a penal statute must be restrained for the benefit of him against whom, the penalty is inflicted. It is a maxim of the common law, that *receditur a placitis juris potius, quam injuria et delicta maneant impunita*, but this applies only to positive maxims, *placita juris*, rather than *regulæ juris*.(*a*) It is said, if the rule be one of the higher sort of maxims, that are *regulæ rationales*, and not *positivæ*, then the law will rather endure a partial offence to escape without punishment than violate such a rule. Of this latter kind (*regulæ rationales*) is the rule that penal statutes shall not be taken by equity. Thus a statute having enacted that those who were convicted of stealing "horses," should not have the benefit of clergy, was held held not to extend to him that should steals but "one horse;" and to remedy this defect a new act was passed to provide for such a case.(*b*)

§ 740. By another restrictive rule of construing penal statutes, if general words follow an enumeration of particular cases, such general words are held to apply only to cases of the same kind as those which are expressly mentioned. Thus, where by a statute persons who should steal sheep, or any other cattle, were deprived of the benefit of clergy;—the stealing of any cattle, whether commonable or not commonable, seems to be embraced in these general words, "any other cattle," yet they were looked upon as too loose to create a capital offence.(*c*)

§ 741. Penal stautes are taken strictly and literally only in the point of defining and setting down the *fact* and the *punishment*, and not generally, "in words that are but circumstances and conveyances in the putting of the case." Thus under a statute that gave an action of

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(*a*) Stephens Law of Elect. vol. i. p. 28; Bacon's Maxims, 51.
(*b*) Id. pp. 28, 29.
(*c*) Id. p. 29.

waste against him that holds *pro termino vitæ vel annorum;* if a man holds but for *one* year he is within the statute. While if the law be, that for a certain offence a man shall lose his right hand, and the offender hath had his hand cut off in the wars, he shall not loose his left hand, but the crime shall rather pass without the punishment which the law assigned, than the letter of the law be extended.(*a*)

§ 742. Reference to some of the cases in which the general rules in reference to the construction of penal statutes will now be referred to in illustration of the general doctrine on this subject. In *Sprague* v. *Birdsall*,(*b*) Birdsall sued Sprague for money had and received, founded upon the fact, that the defendant had crossed the Cayuga Lake on the ice, commencing to cross six miles from the Cayuga Bridge, and having passed off the lake within sixty rods of the bridge. The Cayuga Bridge Comany was incorporated in 1797, and extended by amendment to 75 years. The second section of the act enacted, that it should not be lawful for any person or persons to erect any bridge, or establish any ferries, within three miles of the bridge erected by the company, neither should it be lawful for any person or persons, after it was erected, to cross the lake within three miles without paying toll; but persons might pass and repass in their own boats without being subject to toll. The questions in the case were: 1st, whether this was a crossing within three miles within the act; 2nd, if so, whether crossing on the ice subjected the defendant to toll. Savage, Ch. J., held, that the act conferred upon the company certain privileges, and restrained the right of the citizen. It was in a measure penal, and ought to

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(*a*) Bacon's Maxims, 58, 59; Stephen's Elec. Law, 29.
(*b*) 2 Cowen, 419.

be construed strictly. In the construction of satutes made in *favor* of *corporations* or *particular persons*, and in derogation of common right, care should be taken not to extend them beyond their express words, or their clear import. They could not take away a common law right, unless their intention was manifest, and where not *remedial* were not to be extended even by equitable principles. It could not be supposed the legislature intended such a crossing as this. By the proviso, every person was at liberty to cross in his own boat. The object of the legislature seemed to have been, that all persons who were compelled to resort to the aid of others in crossing, should cross the bridge, and pay toll accordingly. They did not intend to compel those who had the means of crossing independent of the bridge, to cross on the bridge and pay toll.

§ 743. In another case,(*a*) an action of debt was brought for a penalty, under ch. 44, 1 R. L. 223, which was an act to prevent *horse racing*. The first section declared all racing and running, pacing and trotting for a bet, &c., common and public nuisances, and offences against the state, and that all concerned should be punished by fine and imprisonment. The second section enacted, that the owner of every horse used in *horse racing*, with his privity or permission, whereon bets were laid, should forfeit for every race the value of such horse. The penalty was claimed on the ground that the defendant, on the 23d November, 1822, owned a mare, which was on that day employed in *trotting*, by his privity and permission, with a horse of the plaintiff's, on which stakes were laid and bets pending by defendant. It was insisted that although the term *trotting* was not used, as the statute was passed for the public

(*a*) *Van Valkenburgh* v. *Torry*, 7 Cowen, 252.

good, though penal, it should be construed equitably. *Trotting* was within its mischief. Savage, Ch. J., held, that the action could not be sustained for the penalty. Penal statutes were to be construed strictly. Before the passing of this act, the running or trotting of horses for a wager was a lawful amusement, and so far from subjecting those concerned to any punishment, courts enforced the payment of the wager. The legislature had however declared those acts nuisances, and persons offending might be indicted under the first section of the act and punished in the manner provided by it. The second section had added to former punishment for *racing*, a *forfeiture* of the value of the horse. That if it intended to punish those who trotted horses with a superadded penalty it was easy to have said so. The decisions that penal statutes should receive an equitable construction, so that cases not named may be included in the penalty, rested on the ground that the law-makers could not set down every case in express terms, but that rule did not apply when all offences are enumerated, and a distinction is made in the punishment. When an additional penalty is imposed upon one only, the rule *expressio unius exclusio alterius* applied.(*a*)

§ 744. *Coolidge* v. *Williams*,(*b*) was an action on the case brought to recover treble value for fish taken within the limits of Watertown, under a statute 1797, sec. 75, which gave the power to certain towns, of which Watertown was one, to regulate the time, place and manner of taking fish within their limits, and to sell the right of taking. Section three declared, that if any person other than those to whom said right was sold should take any fish, such person so offending should forfeit and pay

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(*a*) *Van Valkenburgh* v. *Torry*, 7 Cowen, 252.
(*b*) 4 Mass. 140.

to the use of any person who might sue, the treble value, to be recovered in an action on the case. The defendant caught fish in the Charles River, on the Cambridge side of the river, opposite to Watertown, putting in his seine on the Cambridge side, and then running out into the river over the town line, in the bed of the stream, and then drawing out the seine on the Cambridge side with the fish in it, the deepest water being on the Watertown shore, where the fish usually swam. Higher up the stream, Watertown crosses the river, and its fishing is on the same side as Charlestown. It appeared that the seine could not be conveniently carried without it was extended across the river, which the people of Cambridge had usually done. Parsons, Ch. J. held, that independent of the statute, the defendant or any person had the right to put his seine into the river from the Cambridge shore, and might have landed his fish, if he committed no trespass, on the land. That private statutes, made for the accommodation of particular citizens or corporations, ought not to be construed to affect the rights or privileges of others, unless such construction resulted from express words, or from necessary implication. But every part of the statute might have a reasonable effect, without any such construction. The object of it was to enable the towns named therein to regulate their own rights, then subsisting, and to secure themselves the benefit arising from such regulation. The defendant was fishing on the Cambridge shore, where it seemed the people were accustomed to fish, and in the accustomed manner extending his seine across the river towards the Watertown shore, but not upon it, and taken his fish to the Cambridge shore. This privilege of the defendant, it was not the intention of the statute to infringe. He might enjoy it, giving all the provisions of the statute a reasonable construction.

§ 745. In another case,(*a*) which was an action *qui tam* against the defendant for a rescous, under the statute of 1788, c. 65, in relation to rescous and pound breach, which had created a forfeiture for a rescous. By the sixth section of the act, a forfeiture of forty shillings was created to be recovered in an action of debt *qui tam*; a forfeiture of £5 was also created for a pound breach, and to be recovered in the same manner; and it was provided, in the case of a rescous, the party impressed might recover his damages by action on the case; and in case of pound breach, he might recover double damages by the same form of action. But it was provided, that in the last action, as well as in an action to recover damages for the rescous, the defendant should not be allowed to give in evidence the illegality of distress, to prevent the plaintiff from recovering full damages. The question raised in the case was, whether this latter provision should receive an equitable construction, so as to prevent the illegality of distress from being a bar to the action *qui tam*, to recover the forfeiture incurred by the rescous; it was held that it could not be thus extended. Penal statutes must be construed strictly according to the intention of the legislature, as discovered by the import of the words, and when not remedial, were not to be extended by equitable principles. Statutes were not to be construed as taking away a common law right, unless the intention was manifest. Without this provision of the statute, the defendant might plead in bar to the *qui tam* action, that the distress was unlawful, and this defence neither the express words nor any reasonable construction of them had taken away. This provision, when applied to an action of pound breach, was in affirmance of the common law; and probably in a popu-

(*a*) *Melody* v. *Read*, 4 Mass. R. 471.

lar action to recover the forfeiture created by this statute for a pound breach, the same rule would apply at law without the aid of the statute. But by the express words of the statute, this defence is prohibited only in the action on the case to recover damages, either for a rescous or a pound breach. It did not extend to the *qui tam* action for forfeiture.

§ 746. We have already seen that the reason why penal statutes should not be extended by construction seems to be, that the law does not allow of constructive offences or of arbitrary punishment: no man incurred a penalty unless the act which subjects him to it be both within the letter and spirit of the statute imposing the penalty. It has been said, with great propriety, that if this fundamental rule was to be violated, the fate of innocent persons would be decided by the arbitrary discretion of judges, and not by express authority of law.(*a*) The rule seems to be well settled that a penalty must always be created by express words, and that it cannot ever be raised by implication.(*b*)

§ 747. In the case of *The Enterprise*,(*c*) it was said: "But while penal statutes are to receive a strict construction, nothing more is meant than that they shall not, by what may be thought their spirit or equity, be extended to offences other than those which are specially and clearly described and provided for. A court is not precluded from inquiring into the intention of the legislature. However clearly a law may be expressed, this must ever, more or less, be a matter of inquiry. A court is not, however, to arrive at this intention by mere conjecture, but is to collect it from the object which the legislature had in view, and the expressions used, which

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(*a*) 1 Stev. El. L. 29.

(*b*) *Jones* v. *Estes*, 2 J. R. 379.

(*c*) 1 Paine's R. 32.

should be competent and proper to apprise the community at large of the rule which it is intended to prescribe for their government. For although ignorance of the law be no excuse for its violation, yet if this ignorance be the consequence of an ambiguous or obscure phraseology, some indulgence is due to it. It should be a principle of every criminal code, and certainly belongs to ours, that no person be judged guilty of an offence, unless it be created and promulgated in terms which leave no reasonable doubt of their meaning. If it be the duty of the jury to acquit where such doubt exists concerning facts, it is equally incumbent in a judge not to apply the law to a case where he labors under the same uncertainty as to the meaning of the legislature. If this be involved in a considerable difficulty from the use of language not perfectly intelligible, much circumspection becomes neeessary, especially if the consequences are so penal as scarcely to admit of aggravation. When the sense of a penal statute is obvious, consequences are not to be disregarded; but if doubtful, they are to have their weight in interpretation. It will at once be concluded that no man should be stripped of a very valuable property—perhaps of his all—be disfranchised and consigned to public ignominy and reproach, unless it be very clear that such high penalties have been annexed by the law to the act which he has committed. If these principles be correct, a court has no option where considerable ambiguity arises in a penal statute, but is bound to decide in favor of the party accused. It is more consistent with the principles of liberty that a court should acquit when the legislature intended to punish, than that it should punish when it was intended to punish with impunity."

§ 748. These general principles were applied in the case of *The Enterprise*, which was a libel for an offence, which if it consisted in any thing, it was in lading cer-

tain merchandise, of the value of more than $400, on board of the schooner Enterprise in the *night*, without any license or permit from the collector and naval officer, and without the inspection of any officer of the revenue. The law under which it was claimed this was a forfeiture, was the supplementary embargo act passed 25th April, 1808, and the main reliance was placed upon the second section, which declared substantially, "that during the continuance, of the act laying an embargo, no ship or vessel of the character of the Enterprise should receive a clearance, unless the lading shall be under the inspection of the proper revenue officers, subject to the same restrictions, regulations, penalties and forfeitures, as are provided by law for the inspection of merchandise imported into the United States, upon which duties are imposed, any law to the contrary notwithstanding." It was contended that this section implicated this vessel and its cargo in the same penalties which were imposed by the fiftieth section of the collection law, on the landing of goods imported contrary to its direction, which provided: "That no goods brought from a foreign port shall be unladen but in *open day*, between the rising and setting of the sun, except by special license from the collector and naval officer of the port, nor at any time without their permit." The penalty for an infraction of either of these directions was a forfeiture by the master and every other person knowingly concerned or acting therein, of the sum of $400, and disability of holding an office of trust or profit under the United States for a term of years not exceeding seven, the goods to be forfeited, and the vessel also if the goods at the place landed were of the value of $400. After adverting to the general principles above laid down, Livingston, Ch. J., says, "that almost every possible evasion of the law relating to the embargo had been previously guarded against by adequate sanctions, except that of loading clandestinely or by night

and then going to sea without a clearance or giving bonds, this was the evil to which it was intended to apply a remedy. This may have been in the contemplation of congress, but the court were not bound to conclude that they had done what was intended, unless fit words were used for that purpose. No words of prohibition were to be found in the section. There was no interdiction to load at any time, nor without the intervention of the revenue officers. Penal laws generally first prescribe what shall or shall not be done, and then declare the forfeiture. This course is pursued in all the other offences created by the statute, and very generally by all the other penal laws of the United States. The court would not say that an offence can be created in no other way, but when there was such a departure from an almost universal rule, and from other parts of the same law, it suggests strong doubts whether the legislature intended to prevent in any other way than by withholding a clearance. The court was not without its doubts, whether it was meant to punish the mere act of loading secretly in any other way. This doubt, which was produced by the unusual and not very luminous phraseology of this section, was increased by a consideration of the very heavy and disproportionate punishment which would follow. The ~~could~~ court not, without great hazard of mistake, select from a law of great length, containing no less than one hundred sections, and a very great length and variety of provisions and penalties, any particular part, where the reference to the penalty was so certain as to apply it to this case, and as it was doubtful whether any offence was created by the act of 25th April, 1808, and still more so what were the penalties for its violation; the court could not persuade itself that the prosecution could be sustained."

§ 749. Although, as a general rule, it is well settled that penal statutes are to be construed strictly, and are

not to be extended by an equitable construction, yet it will be found equally well settled that they are not to be construed so strictly as to defeat the obvious intent of the legislature, nor are the words to be so narrowed down as to exclude from their operation cases which those words, in their ordinary acceptation, or in the sense in which the legislature obviously used them, would comprehend. This distinction has been recognized in several American cases. Chief Justice Marshall in one case,(*a*) admitted and recognized the rule, although under the circumstances of that particular case he did not admit its application. He remarked: "It has been said, that although penal laws are to be construed strictly, the intention of the legislature must govern; that if a case be within the intention it must be considered as within the letter, so if it be within the reason of the statute. The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislature, not in the judicial department. It is the legislature and not the court which is to define the crimes and ordain the punishment. It was true that the intention of the legislature must govern the construction of penal, as well as other statutes; but this was not a new and independent rule which subverted the old, it was a modification of the ancient maxim, and amounts to this; that although penal laws were to be construed strictly, they were not to be construed so strictly as to defeat the obvious intent of the legislature." He then states the rule and its qualifications as above stated by us, and then adds: "The intention of the legislature is to be collected from the words they

(*a*) *The United States* v. *Wilterberger*, 5 Wheat. 76.

use. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of the words, especially in penal acts, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize the court to say so. It would be dangerous indeed to carry the principle that a case that is within the reason or mischiefs of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it was of equal atrocity, or of a kindred character with those which were enumerated. If this principle had ever been recognized in expounding criminal law, it had been in cases of considerable irritation, w hich t would be unsafe to consider as precedents forming a general rule for other cases."

§ 750. The principles of the rule laid down by Ch. J. Marshall have been admitted and applied in several subsequent cases. In *The American Fur Co.* v. *The United States*,(*a*) which arose under the act of congress of 30th March, 1802. The act, after defining in general terms the boundary lines between the Indian tribes and the United States, prohibited citizens of, or residents within the United States, crossing over the lines to hunt, &c., made it lawful for the military force to apprehend such persons. The twenty-first section, as amended by the act of 6th May, 1822, authorized the president to take such measures, from time to time, as he deemed expedient, to restrain vending or distributing spirituous liquors among such tribes. The second section of the act of 1822 authorized the president to direct Indian agents, governors of territories, &c., acting as superintendent of

(*a*) 2 Peters R. 358.

Indian affairs, to cause the stores and packages of goods of all traders to be searched upon suspicion or information that ardent spirits were carried into the Indian country by traders, in violation of the twenty-first section of the act, and declared that if any ardent spirits should be so found, *all the goods* of the particular trader should be forfeited. The libel charged that the defendant, as such licensed trader, did take and carry into the Indian country, with other goods, seven kegs of whiskey, &c., for the purpose of vending, &c., and upon search the same were found, and claimed that *all his goods seized* were forfeited. It was contended, that in order to work a forfeiture of the other goods, the ardent spirits must be *mingled* with the other goods at the time of the seizure, and that no part of the goods but that with which the spirits were found were liable to seizure. The district court had in effect ruled, that if the ardent spirits were found *with a part only* of the goods carried into the Indian country for the illegal purpose stated in the information, *all the goods* of such trader, designed for sale under a license, and seized in the Indian country, were liable to a forfeiture. The supreme court of the United States sustained this decision, and held, that this construction of the acts of congress was well warranted by the words of those acts, as well as the obvious policy which dictated them. The expression "*all* the goods of such traders," in the second section of the last act, although general enough, if it stood alone and unexplained by the context, to embrace all the goods belonging to the trader, wherever they might be found, were clearly restrained by the provision which immediately preceded them, so as to mean those goods only which might be found in company though not in contact with the interdicted articles. That the notion that those goods alone were liable to seizure amongst which the ardent spirits were found, could receive no countenance

from any fair construction of this section; that construction which was contended for would enable the trader, by the most simple contrivance, to protect the whole of his other goods from forfeiture. To effect this he would only have to keep the spirits separated from his other goods during their transportation to, and after arriving in the Indian country, so as not to contaminate those goods by placing them in immediate contact with the offending article. As this construction would sanction so glaring an evasion of the whole policy of the law, it ought in no case to be adopted, unless the natural meaning of the words of the act required it. Even penal laws, which should be strictly construed, ought not to be construed so strictly as to defeat the obvious intention of the legislature.

§ 751. The same principle was also applied in the case of *The United States* v. *Morris*.(*a*) In this case the defendant was indicted under the second and third section of the act of Congress of 10th May, 1800, entitled "An act to prohibit the carrying on the slave trade from the United States to any foreign place or country." The second section of this act declared "That it shall be unlawful for any citizen of the United States, or other person residing therein, to serve on board of any vessel of the United States employed or made use of in the transportation or carrying of slaves from one foreign place or country to another; and any such citizen or other person voluntarily serving as aforesaid, shall be liable to be indicted," &c. The question involved in the cause was, whether a vessel, on her outward passage to the coast of Africa, for the purpose of taking in a cargo of slaves, was "employed or made use of" in the transportation or carrying of slaves from one foreign country

(*a*) 14 Peters' R. 464; see also 2 Mass. R. 144; Paine, 209.

or place to another before any slaves were received on board. Taney, Ch. J. who delivered the opinion of the court, held, that in expounding a penal statute, the court certainly would not extend it beyond the plain meaning of its words—that such statutes must be construed strictly ; yet the evident intention of the legislature ought not to be defeated by an over strict construction. That to be "employed" in any thing, meant not only the act of doing it, but also to be engaged to do it—to be under contract or orders to do it. And this not only was the ordinary meaning of the word, but it had been frequently used in that sense in other acts of Congress. Thus the second section of the act of March 3, 1825, entitled "An act to reduce into one the several acts establishing and regulating the post-office department," declares "That the postmaster-general, and all other persons 'employed' in the general post-office, or in the care, custody or conveyances of the mail, shall, *previous* to entering upon their duties assigned to them, take the oath prescribed to them." Here, the persons who had contracted to perform certain duties in the general post-office, were described as "employed" in that department before they enter upon the duties assigned them. So, also, in the twenty-first section of the same act, various offences, such as the embezzling or destroying any letter, are enumerated, and the punishment prescribed, when committed by any person "employed in any of the departments of the post-office establishment." Yet it could not be supposed the party must be actually engaged in transacting his official duties when the thing was embezzled or destroyed, in order to constitute the offence described in this section. So the act of July 2, 1813,(*a*) spoke of vessels "employed" in the fisheries *before* she

(*a*) 2 Story, 1353.

sailed on the voyage. So in the act of 3d March, 1831,(*a*) concerning vessels "employed" in the whale fishery, "authorized vessels employed wholly in the whale fishery to be registered in a particular manner, so long as such vessel shall be so employed." The registry, license and enrolment must be obtained *before* the vessel sailed on her outward voyage. Thus she was regarded as employed before she sails. In like manner this slave vessel was "employed" in the transportation of slaves within the meaning of the act, if she was sailing on her outward voyage to the African coast, in order to take them on board, to be transported to any foreign country. That it was not necessary, in order to constitute the offence denounced in the second section, that there should be an actual transportation or carrying of slaves in the vessel of the United States, on board of which the party indicted was alleged to serve, nor that there should be an actual transportation. That the voluntary service of an American citizen on board of a vessel of the United States, in a voyage commenced with the intent that the vessel should be employed and made use of in transporting or carrying of slaves from one foreign country or place to another, was in itself, and where no slaves had been transported in such vessel or received on board, an offence under the second section of this act.

§ 752. In another case,(*b*) the defendant was indicted under the statute of 1814, ch. 175, which provided, that if any person, not being authorized by the board of health or the selectmen of any town, should knowingly dig up, remove, or carry away, or aid or assist in digging up, &c., any human body or remains thereof, such person should be imprisoned, &c. It was contended that

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(*a*) 4 Story, 2256.

(*b*) *The Commonwealth* v. *Loring*, 8 Pick. 370.

the indictment did not pursue the statute. The statute did not provide that the license of the selectmen of the town where the body was buried should be obtained ;— the words were, "any town in the commonwealth." Whatever might have been the intent of the legislature, there was nothing in the statute itself restraining it to narrower limits ; and it was no answer to this objection to say that if this construction should be adopted, the statute would not affect its purpose. For it was not for the court to say what the legislature intended, except so far as they could determine it from the words of the act. The words of the statute were so express and unambiguous, there was no room for construction ; and if there was any thing ambiguous, this being a penal statute, it must be taken according to its strict letter. Parsons, J. in answer to this position, admitted that the question arose from an unfortunate obscurity in the terms of the statute on which the indictment was founded. Taken chiefly without reference to the subject-matter, and the manifest intention and the object of the legislature, it would appear, that in order to sustain the indictment on the statute, it must be averred and proved that the board of health or selectmen of *no town in the commonwealth* had given license to do the act complained of. The consequence would be, as oral testimony alone could be admitted on criminal trials of facts provable by witnesses, that the officers of every town, to the number of three and four hundred, must be summoned, and give their personal attendance in the court where the prosecution was pending. The legislature never intended such an absurdity. But it was said, penal statutes admit of no latitude of construction ; they were to be taken strictly, word for word, let the consequences be what they might. He held, it was true it was so laid down as a general rule, and the reason was, that the court should not be allowed to make that an offence which was not so

made by legislative enactment. But this rule did not exclude the application of common sense to the terms made use of in the act, in order to avoid an absurdity which the legislature ought not to be presumed to have intended. There were cases which showed this, although precedents were not required to sustain so reasonable a doctrine.(*a*) All these authorities went to show, that even penal statutes, though to be construed strictly as a general rule, were to receive such a construction as would conform to the intention of the legislature.

§ 753. The same principle was applied in this state.(*b*) In the case cited, the defendant was indicted under section 59, 2 R. S. 2 ed. 565, which provided, if any clerk or servant of any private person, should embezzle or convert to his own use, or take, make way with, or secrete, with intent to embezzle, or convert to his own use without the assent of his master, &c., any goods, &c., *belonging to any other person*, which shall come to his possession, or under his care by virtue of such employment, shall be punished, &c. It was contended, that the words "belonging to any other person" meant other person than the master of the servant, and that the defendant could not be punished for embezzling "the property of his master." That this offence was not within the terms of the statute. Savage, Ch. J. held, that these words meant belonging to any person other than the servant who had been guilty of the embezzlement; any other construction would impute to the legislature an *absurdity*. After adverting to the defects which existed in the common law, and the several statutes which have been passed to remedy those defects—the fact that these statutes, both in this country and England, had been passed

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(*a*) Bac. Ab. Stat. I. 9; *Heyden's case*, 3 Co. 7; *Rex* v. *Gage*, 8 Mod. 65; Plow. 86; *Soldier case*, Cro. Car. 71.

(*b*) *The People* v. *Hennesey*, 15 Wendell's Reports, 147.

in reference to the two offences of embezzling the property of others and also that of their masters—he said: "The revised statutes were no doubt intended to embrace, and did embrace the pith of our former statutes, and also the statute of 39 Char. 3, c. 85." He then asks: "Can it be believed, that when the whole course of legislation on this subject has been aimed at the protection of the master or employer against the frauds of those necessarily entrusted with their property, the legislature, when revising and embodying previous statutes into a more simple form of enactment, should lose sight of the great object in view, and protect every person except those most liable to be defrauded? The sixtieth section shows that it was the intention of the legislature to go farther in favor of the master or employer, than of other persons, by making it an offence to embezzle any instrument executed by such master, but not yet issued; a note, for instance, drawn and signed for the purpose of being discounted or delivered in the course of business, but not actually put in circulation. It is very clear, therefore, that the offence consists in embezzling the money, goods, rights in action, or other valuable security or effects whatever, belonging to any person other than the person guilty of the embezzlement, which shall have come to his possession or under his care, by virtue of his employment as clerk or servant of a private person, or as officer, agent, clerk or servant of any incorporated company."

§ 753. In *The United States* v. *Schooner Industry*,(a) the rule laid down was, that courts are bound to construe penal statutes strictly, and not to extend them beyond the obvious meaning by strained inferences. On the other hand, they are bound to interpret them accord-

(a) 1 Gallis. 117.

ing to the manifest import of the words, and to hold all cases which are within the words and the mischief, to be within the remedial influence of the statute. In another case it was held, that although penal statutes are not to be extended by construction, yet they are to have a *rational* interpretation.(*a*)

§ 754. In *The United States* v. *Winn*,(*b*) the court recognized the rule of strict construction of penal statutes in a true and sober sense; that is, they were not to be enlarged by implication, or extended to cases not clearly within their words and purport. But where the words were general, and included various classes of persons, the authorities did not require the court to restrict them to one class, or in giving them the narrowest interpretation. Where the mischief to be redressed by the statute was equally applicable to all of them, and where a word is used in a statute which has various known significations, the court were not required to adopt one in preference to another, simply because it is more strained, if the objects of the statute equally applied to the largest and broadest sense. The proper course in all such cases was, to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and which would promote, in the fullest manner, the apparent policy and objects of the legislature.

§ 755. The case last cited is one illustrative of the application of this rule. The defendant was indicted as master of the ship Eliza, for having for malice, hatred and revenge, and without justifiable cause, on the high seas, beaten and imprisoned one John B. Bassett, one of the crew of same ship; Bassett was at the time chief

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(*a*) *Beals* v. *Boyne*, 5 Harris & Johns. 27.

(*b*) 3 Sumner, 211.

officer of the ship. The indictment was found under the third section of the act of 1835, ch. 40, which provided: "That if any master or other officer of any American ship or vessel, on the high seas, or any other waters within the admiralty and marine jurisdiction of the United States, shall from malice, hatred, or revenge, and without justifiable cause, beat, wound, or imprison, any one or more of the *crew* of the ship or vessel, or withhold from them suitable food or nourishment, or inflict upon them any cruel or unusual punishment, every such person so offending, on conviction, shall be punished by fine or imprisonment." The question presented in this case was, whether the offence when committed by the master upon the *chief or other officer* of the ship was an offence within the intent and purview of the statute; or in other words, whether the word "crew," in this section, was used in contradistinction to *officers* of the ship, so as only to include the common seamen or mariners, or whether the word "crew," in the sense of the statute, embraced all the officers except the master. It was held that it did: 1st. Because the word "crew" had several known significations. In its general and popular sense it was equivalent to *company*. Such was the definition which lexicographers had attached to it. The general sense of the word "crew" being equivalent to ship's company, it could scarcely be doubted, that it embraced all the officers as well as the common seamen; that sense ought not to be displaced unless it was manifest that the legislature had used the word in a more restricted sense, and this must be ascertained from the context, or from the object to be accomplished by the enactment. In examination of the laws upon marine subjects, the word "crew" was found to be used sometimes in this general sense, and sometimes in senses more limited and restrained. It was sometime used to comprehend all persons composing the ship's company, including the mas-

ter; sometimes to comprehend the officers and common seamen, excluding the master; and sometimes to comprehend the common seamen only. 2d. Because there were various acts of congress in which the words "crew," and "ship's company," were used as equivalent to each other. The results of the examination of the leading provisions of statutes upon similar subjects showed that the word "crew" was ordinarily used as equivalent to "ship's company," and that whenever it was not intended to embrace the officers the context manifestly excluded them by enumerating them as contradistinguished from the rest of the crew. 3d. Because that every officer of the ship, except the master or commanding officer, ought to be deemed within the purview of the act as one of the crew. For the reason that he might commit the offence of usurping the command of the vessel as well as a common seaman, and the mischief was the same as in the case of a common seaman, and he was one of the crew and ship's company in the sense of the general maritime law. There was no reason why the section should not be construed to embrace all cases within the words, and within the mischiefs, or why resort should be had to the narrowest possible sense, instead of the general sense, if there was the same mischief in each case to be suppressed, and the same public policy in the protection of the commercial interest of the country. In another case,(*a*) one of the questions which arose was, whether an offence which was committed on board of a vessel on a voyage, although at the time of the act, lying at anchor, was within the provisions of the 2 R. S. 729, sec. 44, providing that, when an offence shall have been committed within this state on board of any vessel *navigating* any river, and an indictment may be found

(*a*) *The People* v. *Hulse*, 3 Hill, 318.

within certain counties therein named, &c. Bronson, J., held that it was; 1st. Because a different construction would amount to a virtual repeal of the statute, especially when applied to canal boats, if the vessel must necessarily be in motion. That it frequently happened that vessels on the river had to come to anchor for the purpose of supplies, or in consequence of calms and adverse winds, or may rest upon shoals and be obliged to wait for tide. It could not be supposed the legislature intended to make so idle a statute as this would prove if it did not extend to the whole voyage. 2d. Because the legislature had spoken of a particular kind of business or employment, and the language must be understood as men engaged in that business would understand it. No seaman or waterman would doubt that this vessel was "navigating" the river, although it happened to be temporarily at rest, in consequence of adverse winds when the crime was committed. 3d. Another statute, which provides that "whenever any vessel navigating the river," shall be at anchor in the night time,(*a*) showed that the legislature thought a vessel might properly be said to be navigating the river although at the particular time at anchor. Another question arising in this cause was, whether the statute was applicable to any case except where the voyage commenced and ended within the river. It was held that it did, for there was no reason why it should be thus restricted. There was nothing in the letter or spirit which led to so narrow a conclusion. A ship trading between New York and Liverpool came as plainly within the language of the statute as to that part of the voyage which was performed within the *fauces terræ* as did a sloop trading between Albany and New York; the same reasons applied to both. 4th. Because this

(*a*) 2 R. S. 685, sec. 12.

statute was not, properly speaking, a penal one; it neither created an offence, prescribed punishment, or altered the mode of trial, it merely changed the venue. The latter consideration probably had great influence on the mind of Mr. Justice Bronson, who in all cases has ever been found in favor of a strict construction of penal laws and constitutional provisions, and hostile to any thing bordering upon judicial legislation.

§ 756. The numerous cases we have cited sufficiently define the rules which govern in the construction of penal statutes, and the qualifications and limitations to the rule, that in general they are to be construed strictly. From the frequency of questions arising out of this general doctrine, we have deemed it important to annote very fully the leading cases in this country, where this rule has come under consideration, and so far to present the circumstances under which they arose, as to give the reader a clear understanding of instances in which it has been applied, and the qualifications under which such application has been made, and thus obviate a necessity of a resort to the reported cases on this subject.

CHAPTER XIX.

OF THE REPEAL OF STATUTES.

§ 757. If laws and statutes seem contrary to one another, it is by some supposed that the latter one will abrogate or repeal the former. This rule, however, has its qualifications. In such cases, if by interpretation they may stand together, they shall so stand; and if two laws only so far disagree or differ as that they may, by any other construction, both stand, they will both be upheld; for whenever this can be done, the rule that subsequent laws abrogate prior ones does not apply, and the last law will not operate as a repeal of the former.(*a*) When it is not manifestly the intention of the legislature that a subsequent act shall control the provision of a former act, the subsequent shall not be construed as having such an operation, even though the words, taken strictly and grammatically, would repeal the former act.(*b*)

§ 758. It may be laid down as a general rule, that it is deemed against the policy of the law to favor repeals by implication; and positive enactments are not to be construed as interfering with pre-existing contracts, rights of action, or suits of a civil nature not penal in their consequences, unless the intent thus to interfere has been expressed in the enactment. It is upon this principle that our courts have held, that the only effect the revision of

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(*a*) *Canal Co.* v. *Railroad Co.* 4 Gill & John. 6.
(*b*) Ibid. 6.

our statutes had upon offences previously committed was, that the proceedings in the subsequent prosecution of such offences must be conducted according to the provisions contained in the Revised Statutes.(*a*) Where those statutes instituted one action for another—such, for instance, as ejectment for the writ of dower—the revision only affects the form and mode of proceeding in such suits; and even in this respect the latter does not affect the mode of conducting suits which were commenced previous to the time they went into operation; and we have seen, in a previous chapter, that whenever a person has a right to sue at common law, and a remedy is likewise given by an affirmative act, without a negative expressed or implied of the action at common law, it does not take away the common law remedy, and the party may, at his election, avail himself of either.(*b*)

§ 759. We have seen, that where a right is granted by a statute, and a subsequent statute gives a forfeiture or penalty for the violation of that right, such forfeiture or penalty is cumulative to the remedy provided at common law, in cases of the violation of the statute right, when the statute itself is silent.(*c*) But inchoate rights generally derived under a statute, are lost by its repeal, unless saved by express words in the repealing statute. It is otherwise, however, in regard to such civil rights as have become perfected far enough to stand independent of the statute; or, in other words, such as have ceased to be executory, and have become executed.(*d*) As a general rule, it is undoubtedly true, an act of the legislature annulling contracts, or creating new exceptions and defences, should be so construed as not to affect con-

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(*a*) *The People* v. *Phelps*, 5 Wend. R. 10.
(*b*) 10 John. R.; see also 5 John. R. 175.
(*c*) 9 Ibid. 507.
(*d*) *Butler* v. *Palmer*, 1 Hill R. 324.

tracts or rights of action vested and existing at the time of its enactment.(*a*) Statutes modifying a remedy of a party should be so construed as not to affect actions commenced before such acts were passed. But the two last rules obtain only in cases of positive enactments, and they will be found not to arise under repealing clauses, and are founded upon the well settled rule that statutes are not to have a retrospective operation, or *ex post facto* effect, unless declared to be so by express words or positive enactments, and even then subject to the qualification stated by us in sec. 533.

§ 760. The rule that vested civil rights, acquired under a law, are not affected by a repeal, is founded in good sense and reason, is consonant to the fundamental principles of natural justice, and has been derived from the civil law. We have stated in sec. 161 the clear and succinct view of this subject laid down in Taylor's Civil Law, to which our readers will do well to refer to in this connection.

§ 761. Puffendorf says the law itself may be disannulled by the author, but the rights acquired by virtue of that law while in force must still remain. He however adds:—"Suppose it were a law, that as a man disposed of his possessions by will, so the right to them should stand; yet it would be unreasonable to take away from one person what fell to him by will while the former law was in use and vigor." Mr. Justice Cowen, in speaking of the effect of a repeal upon *inchoate* rights, says, I understand the rule of the writers on the civil law perfectly to agree with that acted on by our own courts in all their decisions ancient and modern. Those writers

(*a*) See *Gilmore* v. *Shooler*, 2 Mod. 310; *Dash* v. *Van Kleek*, 7 John. R. 477; *Couch* v. *Jeffries*, 4 Burrow, 2460—2; *Churchill* v. *Crease*, 2 M. & P. 415; S. C. 5 Bing. 177; *Tenington* v. *Hargreave*, 3 M. & P. 137, 143; S. C. 5 Bing. 489.

speak of rights which have arisen under the statute not being affected by the repeal, but the context shows at once what kind of rights they mean. The amount of the whole comes to this, that a repealing clause is such an express enactment as necessarily divests all inchoate rights, which had arisen under the statute which it destroys. These rights are but incidents to the statute, and fall with it, unless saved by the express words in the repealing clause;" after citing from Bracton and the Institutes the maxim, "*Nova constitutio futuris formam imponere debet non præteritis*," and in reference to the quotation from Puffendorf, he adds:—"Here the right had so passed as to be not only vested, but to stand entirely independent of the statute."

§ 762. In *Fletcher* v. *Peck*,(*a*) the rule is recognized, that where a law is in the nature of a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights, and that a party to a contract, although it might be a sovereign state, could not pronounce its own deed invalid. In another case,(*b*) the same principle was recognized, and it was held, that where an act of the legislature had declared that certain lands which should be purchased for the Indians, should not thereafter be subject to any tax, it constituted a contract which could not be rescinded by a subsequent law. Indeed rights thus vested under laws amounting to a contract are, under our government, rendered sacred and inviolate under the federal constitution.

§ 763. Where a right of property or the nature of its enjoyment, has become vested under a contract between parties, as a joint tenancy created by contract, an act abolishing such estates prospectively does not operate to change the nature of the estate existing at the time, and

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(*a*) 6 Cranch, 88.

(*b*) *The State of New Jersey* v. *Wilson*, 7 Cranch, 164.

created and vested under that contract. It has been held,(*a*) that an estate of freehold in joint tenancy, created before the date of an act respecting joint tenants and tenants in common, which declared: "No estate, after the passing of this act, shall in this state be considered and adjudged to be an estate in joint tenancy, except it expressly set forth in the grant or devise *creating* such estate, that *it is* the intention of the parties to *create* an estate of joint tenancy, and not an estate or tenancy in common, any law, usages, or decision heretofore made to the contrary notwithstanding," was not affected by that act. The decision of this case was put upon the ground, that if the act destroyed the nature of the estate it was one impairing the obligation of a contract, and therefore void and inoperative under the federal constitution; and also upon the ground of the rule, that whenever a statute is susceptible, without doing violence to its terms, or subverting some established rule of construction, of being understood either as exclusively prospective, or as both prospective and retrospective in its enactment, courts of justice would always adopt the former construction, especially if a retrospective operation would work injustice to any one; and the statute ought not to have a retrospective operation unless its words were so clear, strong, and imperative, that no other meaning could be annexed to them, or unless the intention of the legislature could not be otherwise satisfied; and that this rule ought especially to be adhered to, when such a construction would alter the pre-existing situation of parties, or would affect or interfere with their antecedent rights. These considerations led irresistibly to the conclusion, that the act in question was entirely prospective, and that the court would not impute to the

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(*a*) *Den ex dem. Berdan* v. *Van Riper*, 1 Harrison, 7.

legislature any intention at variance with any of the sound and moral principles of law, or as coming into conflict with any vested rights. In *Den* v. *Robinson*,(*a*) the plaintiff claimed title under the statute *de donis conditionalibus*, on the decease of his father, who died seised in tail 12th March, 1798. The statute under which his title accrued was on 13th June, 1799, declared by a legislative act to be no longer in force in the state, and it was contended that subsequent to the passage of the latter act, the plaintiff could not come in and make title under the former act. But it was held, that as the estate if it passed at all, passed before the date of the act of 1799, and hence that the repeal of the first act, or the rendering it for the future inoperative, did not destroy an estate already vested under its authority. In another case,(*b*) the same rule was applied, and it was held, that repealing, or rendering inoperative for the future, an act, would not destroy an estate already vested under it; and that where one statute is repealed by another, acts done in the meantime while it was in force shall endure, stand, and be effectual.

§ 764. Another illustration of this rule is found in a case(*c*) where an act of congress, providing for the compensation of collectors of duties, gave to the collector three per cent. on all moneys received on account of duties arising on goods imported into the United States within his district. Duties had arose under that act while in force. A supplementary act was passed, the words of which were, "That in lieu of the commissions heretofore allowed by law, there shall from and after the 30th day of June next, (1800) be allowed to certain collectors named, two and a half per centum, on all mo-

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(*a*) 2 Southard, 706.

(*b*) *Den ex dem. Jones* v. *Dubois*, 1 Har. 286.

(*c*) *The United States* v. *Heth*, 3 Cranch, 399.

neys which *shall* be collected and received by them. The question in the case was, whether those collectors were restricted to two and a half per cent. on moneys collected on account of bonds taken previous to the passage of the latter act. It was held they were not. On behalf of the United States it was contended, that the rights of the collectors of duties, with regard to their compensation were absolutely submitted to the will of congress; that congress had uniformly increased or diminished that compensation as circumstances suggested the expediency of that measure, without regarding any supposed limitation of their right to do so, imposed by claims of their officers; and it had been the uniform policy of the government to apportion the commission according to the actual receipt of money; and, therefore, whatever may have been the proportion of their labor or responsibility, their right to compensation was not consummated before the actual receipt of the duties and the amount of their commission remained liable to be increased or diminished at the will of congress; and in passing their act of May 10th, 1800, they had a right to give it a retroactive operation, and the latter words of the second section, "arising on goods imported," would bear and ought to receive such a construction. Johnson, J., held, that the rights of the collectors of duties, as to their compensation, were submitted to the justice and honor of the country that employed them, until consummated by the actual receipt of the sums bonded in their respective offices; but where an individual had performed certain services, under the influence of a prospect of a certain emolument, that confidence which it was the interest of government to cherish in the minds of her citizens, a confidence which experience left no room to distrust in our own, would lead to a conclusion, that it could not have been the intention of the legislature to defeat a reasonable expectation of her officers, suggested

by her own laws. Unless, therefore, the words were too imperious to admit of a different construction, it would be gratifying to the court to be able to vindicate the justice of the government, by restricting the words of the law to a future operation. That it was the policy of the United States, in granting compensations to her revenue officers, to limit the consummation of their right to the actual receipts of money, was evident from a view of all her acts on that subject. Upon considering the question, therefore, upon the construction of the act, they were confined to the single inquiry, how far the government had exercised its power in reducing the compensasion to the defendant from three to two and a half per cent.? The words of the act, "arising on goods imported," although in themselves very indefinite in point of time, would receive a precise signification in this respect by supplying the words "heretofore," to give them a past, or "hereafter," to give them a future signification. If it were necessary that the court should make an election between the words, in order to complete the sense, its choice should be immediately determined by recurring to two well known rules of construction, viz., that it ought to be consistent with the suggestion of natural justice, and that the words should be taken most strongly *contra proferentem.* But there were other considerations which would lead to such a conclusion, without supplying any supposed deficiency in the wording of the sentence. There was nothing, either in the terms made use of, or in the professed object of the law, necessarily retrospective; but the general intention of the act, as well as the signification of the word "*arising*," both pointed to a future operation. Besides which, where it could be shown that a government had once adopted a certain rule of justice for its conduct, it was fair to infer, that in legislating afterwards upon the same subject, it was

intended to pursue the same rule, unless the contrary should be clearly expressed; and in the act of 3d March, 1797, which varied the compensation of the revenue officers in several particulars, that alteration was expressly restricted to take effect only with regard to future importations. Mr. Justice Patterson held, words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning could be annexed to them, or unless the intention of the legislature could not be otherwise satisfied. This rule ought especially to be adhered to when such a construction would alter the pre-existing situation of parties, or would affect or interfere with their antecedent rights, services and remunerations, which was so obviously improper, that nothing ought to uphold and vindicate the interpretation, but the unequivocal and inflexible import of terms and the manifest intention of the legislature. The word "*arising*" referred to the present time, or time to come, but could not, with any propriety, relate to the subject-matter, and the words with which it was associated. Thus the word "arising," coupled with the words "on goods imported," showed that the whole clause had a future bearing and aspect, and would not justly admit of a retroactive construction. According to this view, the commission of two and a half per cent. was to be restricted to moneys received by the collector on account of the duties arising on goods, wares, and merchandise which should be imported after the 30th of June, when the act went into operation. To fortify the foregoing construction, it might be added, that the words of a statute, if dubious, ought, in cases of the present kind, to be taken most strongly against the makers.

§ 765. It has been held, that the repeal of a statute conferring jurisdiction took away all right of proceeding under the repealed statute, even in regard to suits pend-

ing at the time of the repeal.(*a*) This rule has been applied in regard to penal statutes, as we shall have occasion hereafter to show, and the same rule has been held as to the consequences of a repeal against a civil right, so long as it remains inchoate. Such was the case in the *case of Miller*.(*b*) In that case the repeal was held to work the same consequences against a civil right. Miller, an imprisoned insolvent, had been compelled to assign his property, and was entitled to be discharged, by an order of the court of quarter sessions, as early as the 26th of September, 1761. But the 2 Geo. 3, ch. 2, had already passed, repealing the compulsory clause—such repeal to take place from and after the 19th of November of that year. The insolvent urged his discharge, but the sessions adjourned from time to time till after the 19th, then refused to grant it, on the ground that the repealing act had taken place. On motion for a mandamus, Lord Mansfield, Ch. J. delivered the opinion of the court, and held that no jurisdiction now remained in the sessions. He cited the repealing clause, which to be sure, was very strong, "That from and after, &c., the same is hereby repealed *to all intents and purposes whatsoever*." But this, according to what was held in *Surties* v. *Ellison*, and other cases on the repealing clause in 6 Geo. 4, ch. 16, was no more than a simple repeal. The first section of the 6 Geo. 4, simply repealed all the previous statutes of bankruptcy; but by the last section, the section was not to take effect till the 1st September, 1825. And there being no saving clause as to acts of bankruptcy committed, or any inchoate proceedings under the former acts, it was held that the court had no power to imply a saving clause, although it was plain that by a

(*a*) *Butler* v. *Palmer*, 1 Hill R. 324.
(*b*) 1 Blacks. R. 451.

mere inadvertence in legislation, the kingdom was left for a time entirely destitute of its bankrupt law. The court was pressed for a construction which might avert so great a general evil. But Lord Tenterden said: "We are not at liberty to break in upon the general rule;" though he admitted that it was very unfortunate that an act of so much importance should have been framed with so little care. In a previous case, Best, C. J. said, that on the 1st of September all former acts were entirely got rid of.(*a*) In a subsequent case, a struggle was made to save a deposition, as evidence, which had been taken to support a commission of bankruptcy under the former statute,(*b*) but which deposition did not happen to have been enrolled as that section required, in order to make it admissible. It was, in all other respects, completely under the former statute; but the party inadvertently omitted the act of enrolment, till after the repealing clause took effect. And the court held, that no right remained even to enrol, although the repealing act provided the like power of enrolment in proceedings under itself. In short, after much consideration, the court declared that the clause operated as a simple repeal; and Lord Ch. J. Tindall laid down the rule applicable to such a case. He said: "I take the effect of a repealing statute to be, to obliterate it (the statute repealed) as completely from the records of the parliament as if it had never passed, and that it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted and *concluded* while it was an existing law."(*c*)

§ 766. It will be perceived that the rule laid down in

(*a*) *Meiggs* v. *Hunt*, 12 Moore, 357, 359; S. C. 4 Bing. 213.
(*b*) 5 Geo. 2, ch. 30, sec. 14.
(*c*) *Rey* v. *Goodwin*, 4 Moore & Payne, 341, 351.

this and several other cases, has no respect whatever to the circumstance that the repealed statute was either of a criminal or jurisdictional character. Nor is it perceived why, in cases of civil rights, an exception is not just as practicable in favor of a jurisdiction given to enforce the right as to the right itself. On authority, then, at least, no rights arising under the repealed statute can be saved, except by express reservation in the repealing statute, or where those rights have been perfected, by taking every step which depended, for its force, on the former act.

§ 767. Dwarris expresses the result of the cases in this way: "When an act of parliament is repealed, it must be considered—except as to those transactions passed—*closed*, as if it never existed."(*a*) The meaning of the exception is illustrated by an older case. The statute 1 and 2 Phil. & Hen. allowed devises to spiritual corporations, and such a devise was made and took effect. The subsequent repeal of the statute by 1 Eliz. ch. 1, was held not to affect the right of the devisee.(*b*) It would not, however, have been so, had the testator lived till the 1 Eliz. had been passed.

§ 768. In *The People* v. *Livingston*, a creditor had in August, 1829, acquired a right to redeem, under a certain form under the then statute of executions, which by an enactment in 1828 was to be repealed from and after the 31st December, 1829. The repealing statute substituted a new form of redemption. Savage, Ch. J. said, that an attempt, after the 31st of December, to redeem after the old form, was nugatory. The right to redeem, in a certain form, being inchoate, and not expressly reserved by the repealing statute, it was held to have died with the old law, at the close of the year 1829. This decision

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(*a*) Dwarris on Statutes, 676. (*b*) Jenk. Cent. 233, case 7.

seems to have been in exact conformity with the principle of the English cases.

§ 769. The doctrines we have been considering were applied in the case of *Butler* v. *Palmer*,(*a*) which arose under a redemption act. In that case the act relative to redemption, passed May 12, 1837, gave a right of redemption at any time within a year from a sale under a mortgage. The act of April 18, 1838, repealed the former act, to take effect 1st November, 1838, and it was held that the right to redeem became extinct from the time that the act of 1838 took effect, although the sale took place before the passage of the latter act, and a year from the time of sale had not expired. In answer to the objection that a right of action and other executory rights arising under a statute were vested, and ought not to be taken away by a subsequent statute, the court say—"They are so, and a subsequent statute ought not to repeal them, though they may do it by express words, unless they amount to a contract within the meaning of the constitution. That the very terms of the defendant's proposition, when plainly stated, would seem to show that he could have had no right, in the nature of things, after the 1st November. His right to redeem depended on a statute which he admits had no existence at the time. That the general distinction lies between those rights which are executed and those which are executory, or as it would have been expressed by the civil law makers; the *jus in re*, acquired under the repealed statute, and the *jus ad rem* so acquired, that an actual redemption would have presented an instance of the former; the mere right to redeem was an instance of the latter. A right carried into judgment, or taking the form of an express executory contract under a repealed sta-

(*a*) 1 Hill, 324.

tute, might perhaps stand on the same grounds with the case of a devise above cited from Jenkins, and so of other rights having the means of vitality, independent of the statute.

§ 770. Thus far we have confined our remarks almost exclusively to the effect of a repeal upon civil rights. We shall, in the next place, proceed to consider the effects of a repeal upon penalties created or given under a statute. It is a general rule, that the repeal of a law creating an offence, whether it be felony or misdemeanor, sweeps away all prosecutions against it without a saving clause for that purpose.(*a*) There can be no legal conviction for an offence, unless the act be contrary to law at the time it is committed; nor can there be judgment unless the law is in force at the time of the indictment *and judgment.* If the law ceases to operate by its own limitation, or by a repeal, at any time *before judgment, no judgment can be given.* This rule always prevails as it regards penalties either civil or criminal, unless the repealing clause makes it operate prospectively, only preventing the operation of the repeal, and continuing the repealed law in force, as to all pending prosecutions.(*b*) A reference to a few of the adjudicated cases on this last point will illustrate this rule.

§ 771. In an anonymous case,(*c*) the defendant was indicted for perjury under the bankrupt law. The law had been repealed before *indictment.* Washington, J. held—"Every offence for which a man is indicted must be laid against some law, and it must be shown to come

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(*a*) 1 W. C. C. R. 87.

(*b*) 11 Pick. 350; *Scott* v. *Commonwealth*, 2 Virg. Ca. 54; *State* v. *Cole*, 2 McCord, 1; *Commonwealth* v. *Welch*, 2 Dana, 330; *Road in Hatfield*, 4 Yeates R. 392; *Alto* v. *Commonwealth*, 3 Virg. Cas. 382; *State* v. *Tombeckbee Bank*, 1 Stew. R. 347; *Commonwealth* v. *Leftwick*, 5 Rand. 657; *Lewis* v. *Foster*, 1 N. H. 61.

(*c*) 1 Wash. C. C. R. 87.

within it. Such law might be the general, unwritten, or common law, or the statute law. The offence must not only come within the terms of such law, but the law itself must at the time be subsisting. It was a clear rule, that if *a statute create an offence, and is then repealed*, no prosecution could be instituted for any offence committed against the statute previous to its repeal. The end of punishment was not only to correct the offender, but to deter others from committing like offences. But if the legislature has ceased to consider the act in the light of an offence, those purposes were no longer to be answered, and punishment was then unnecessary."

§ 772. As to civil rights, the rule is, that rights acquired under or barred by an existing law, are not defeated by the repeal of the law. In an admiralty case,(*a*) where an appeal suspended the sentence, it was held, that if the law under which the sentence of condemnation was pronounced be repealed after sentence in the court below, and before final decree in the appellate court, no sentence of condemnation could be pronounced, unless some special provision was made for that purpose by the statute. Marshall, Ch. J. held, the court were clearly of opinion that in admiralty cases an appeal suspends the sentence altogether, and that it was not *res adjudicata* until the final sentence of the appellate court should be pronounced. The cause in the appellate court was to be heard *de novo*, as if no sentence had been passed. The court therefore held, that the cause was to be considered as if no sentence had been pronounced. It had been settled on general principles, that after the repeal of a law, no penalty could be enforced nor punishment inflicted for violation of the law, committed while

(*a*) *Yeaton et al.* v. *United States*, 5 Cranch, 281.

it was in force, unless some special provisions be made for that purpose by statute.

§ 773. In one case,(*a*) the question was, whether a saving clause in a repealing act saved cases subject to criminal punishment, and it was held it did not. Mr. Justice Story, in delivering the opinion of the court, says: "By the nineteenth section of the act of March, 1809, it is enacted, 'that the act laying an embargo on all ships and vessels in the ports and harbors of the United States, and the several acts supplementary thereto, shall be, and the same are hereby repealed from and after the end of the next session of Congress.' By this clause, (had it stood alone,) the whole embargo acts, together with all their penalties, forfeitures, fines and punishments, would, after the next session, have been swept away, unless they had been passed *in rem adjudicatum*. Of course, every prosecution therefor depending before any court would have been quashed."

§ 774. In another case,(*b*) the defendants were indicted for a misdemeanor, for disinterring a dead body on the 20th February, in the year 1831, *contra formam statuti*. The defendant pleaded *nolo contendere*, and afterwards moved in arrest of judgment, for the following reasons: first, because the offence charged in the indictment, in violation of the statute, passed March 2d, 1814, was repealed by the statute 28th February, 1831, without any saving or excepting clause whatever; and second, because no offence now known by the laws of the commonwealth is therein described. Shaw, C. J. delivered the opinion of the court. He says: "This indictment cannot be maintained consistently with the decision of the court last year in the case of *Commonwealth*

(*a*) *The United States* v. *Mann*, 1 Gallison, 181.

(*b*) *Commonwealth* v. *Marshall et al.* 11 Pick. R. 350.

v. *Cooley*.(*a*) In that case it was held, that the statute of 1814, containing a series of provisions in relation to the whole subject-matter of the disinterring of dead bodies, had expressed, and by necessary implication repealed the provisions of the common law on the same subject. It is clear that there can be no legal conviction for an offence, unless the act be contrary to law at the time it is committed; nor can there be a judgment, unless the law be in force at the time of the indictment and judgment. If the law ceases to operate, by its own limitation or repeal, at any time before judgment, no judgment can be given. Hence it is usual, in every repealing law, to make it operate prospectively only, and to insert a saving clause preventing the operation of the repeal, and continuing the repealed law in force, as to all pending prosecutions, and often as to all violations of the existing law already committed." Mr. Justice Cowen(*b*) also sanctioned the doctrine, that where a statute repeals a former one, which imposes a penalty, or which confers jurisdiction, the right to the penalty becomes extinguished, even though a prosecution for it had been previously commenced, and that if the repeal take effect after the conviction, the judgment was thereby arrested.(*c*)

§ 775. It has been said as a general rule, the effect of repealing statute varies according to its nature and object and the circumstances of the case. The following propositions, we think, are fairly deducible from the cases bearing upon the subject we have had under consideration. 1. If the right acquired under a statute, be in the nature of a contract, or a grant of power, a repeal will

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(*a*) 10 Pick. 37.

(*b*) *Butler* v. *Palmer*, 1 Hill R. 324.

(*c*) See also *Stoever* v. *Immell*, 1 Watts, 258; *Road in Hatfield*, 4 Yeates, 392.

not divest interest acquired, or annul acts done under it 2. If the legislature *ex mero motu* by a statute give an individual property belonging to the state, and he accept it, then it becomes a gift executed, and the legislature cannot reform the gift any more than an individual could, under similar circumstances; hence a repeal of such a statute after the actual acceptance, would not deprive the donee of the property. 3. If a penal statute be repealed, after acts done in violation of it, the violator is not subject to punishment under it after the repeal. Hence if all crimes or penalties should at once be repealed no offender could be thereafter punished. 4. Where a statute restraining a man's natural rights, or his use of his property is repealed, he is restored to those rights as before the law was passed.(*a*) 5. Where a statute gives a right in its nature not vested but remaining executory, if it does not become executed before a repeal of the law it falls with it, and cannot thereafter be enforced.

§ 776. Where a statue imposes a new penalty for an offence, it repeals by implication so much of the former statute as establishes a different penalty. This rule has been adopted, and it has been said, where the legislature impose a second penalty for an offence, whether smaller or larger than the former one, a party cannot be allowed to sue on the one or the other at his option.(*b*) In one case(*c*) the question arose, whether the act of 1838, c. 157, was so far inconsistent with the revised statutes of Massachusetts, c. 47, sec. 3, as to operate as a repeal of the former by implication. The revised statutes imposed a penalty of twenty dollars for persons violating the provisions

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(*a*) See *James* v. *Dubois*, 1 Harr. 285.

(*b*) *Nichol* v. *Squires*, 5 Pick. R. 168.

(*c*) *Commonwealth* v. *Kimball*, 21 Pick. R. 375.

of the statute relating to excise, and the act of 1838 imposed a penalty of not more than twenty dollars, nor less than ten dollars, for a violation of that act. The latter act provided, that the provisions of all laws in force inconsistent with that act were repealed, and there was no saving clause. The act of 1838 had been construed as prohibiting any person not licensed from selling wine, brandy, &c.; the latter prohibited the same thing except wine. The former prohibited sales less than twenty-eight gallons; the latter, sales less than fifteen gallons. The court said, these two statutes, passed at different times, concerning the present case; the former prohibits the forbidden act under a penalty of twenty dollars for each offence; the latter prohibits the same act on pain of forfeiting not more than twenty dollars, nor less than ten dollars for each offence. The former is absolute and imperative, the latter allows a latitude of discretion. It appears to the court, that the one is essentially and substantially inconsistent with the other. That the latter statute, by prohibiting the same act under a lower penalty, though no negative words were used, did in effect declare that it shall not be punished by the higher penalty, and therefore the acts were inconsistent; that the penalties, as they stood in the two acts, were equally inconsistent. The former enacted that the offence should be punished by a penalty of twenty dollars. The latter declared that the same offence should not necessarily be punished by a penalty of twenty dollars, but by such penalty not more than twenty dollars nor less than ten dollars, as the court should direct. That the provision of the former act by which the penalty was fixed, was inconsistent with the provision of the latter, and by the terms of the latter repealed.

§ 777. In the case last cited it will be perceived, that the repeal was held to result from the terms of the latter act, and hence did not involve the question how far one

statute operates as a repeal of another by implication. On that point, however, Shaw, Ch. J., says: "Where one statute is enacted in the same terms as a former one, without a repealing clause, and without any change of provisions, it may perhaps be well maintained that one is no repeal of the other, and that both are in force. Such a case will seldom happen, because a case can hardly be supposed, in which the legislature would have a motive to pass a new law without some intent to change the existing law. But a case may be supposed, where, for the purpose of reducing several statutes into one, upon the same subject, the precise provisions of an existing statute may be embodied in a new one. In such case, it might well be maintained, that a later act would not repeal a former one, so as to prevent a judgment from being passed upon an offence committed before the date of the latter, but upon which no judgment had passed, at the time of its enactment. But every statute is a repeal of all former ones by implication, so far as it is contrary and repugnant thereto, without a repealing clause." It has also been held, that where a statute imposing a penalty for an offence for the benefit of any person who may sue for it, and a subsequent statute is passed, giving the benefit of the penalty to the party injured, increasing the amount of such penalty, that the latter act will operate as a repeal of the former one. And that upon the ground, that it seemed clearly the intention of the legislature to revive the penal sanction of the act, and to provide severer means to enforce the penalty, and that where such a design clearly appears, the former statute thus revised must be considered no longer in force, though not expressly repealed. That the provisions of the act, so far as it went to fix the penalty and prescribe by whom it might be enforced, was an entire substitution of the original act, and operated as

a repeal of the same.(*a*) In *The King* v. *Cator*,(*b*) it was decided that a former statute, inflicting a penalty of £100 and three months imprisonment, on persons enticing away artificers, was virtually repealed by a subsequent statute inflicting £500 penalty and twelve months imprisonment, for the same offence; and the same principle was adopted in the case of *The King* v. *Davis*.(*c*)

§ 778. A limited privilege granted to a few individuals, is merged in a more enlarged privilege granted to all the inhabitants of a state by a subsequent general statute. Thus where a statute provided, that the inhabitants of a particular town might separate from a religious society by the performance of certain conditions, a subsequent act gave such power to all the inhabitants of the state, upon the performance of only part of those conditions; and it was held that the one was repugnant to the other, and operated as a repeal of the former statute. The limited privileges secured by the special statute was merged in the more enlarged privileges granted by the latter act.(*d*)

§ 779. An analogous principle has been applied under a general statute, directing the mode of attachment on mesne process, and selling by execution shares of directors in an incorporated company; and it has been held that such general act operated as a repeal of a different provision for the same object in a prior statute incorporating a particular turnpike company. The incorporating act provided, that the shares in the turnpike should be taken, deemed, and considered as personal estate, to all intents and purposes, and that such shares might be attached and might be sold on execution in the same man-

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(*a*) *Leighton* v. *Walker*, 9 N. H. R. R. 61.
(*b*) 4 Burrow, 20, n. *c*.
(*c*) 1 Leach Cases, 306.
(*d*) *Gage* v. *Currier*, 4 Pick. 399.

ner as was or might be provided for the sale of property by execution. By the general act, directing the mode of attaching on mesne process, and selling by execution shares of debtors in incorporated companies; particular directions were given as to the course to be pursued when any such shares were attached, and also when they were sold on execution, and by one section it was enacted, that the shares and interest held by any person or persons in any such company, might be attached on mesne process, and taken and sold on execution in the manner provided by that act, any thing in the act incorporating such company to the contrary notwithstanding. The court held the general act must govern the mode of proceeding, on the ground that it was intended to have a retrospective operation, and that the fifth section provided expressly that a sale made in this way only, should be good, notwithstanding a different mode might have been provided in the several acts of incorporation.(*a*)

§ 780. A different rule has been held to govern in cases where a particular provision is contained in an act of incorporation, passed subsequent to a general statute upon the same subject, and that the provisions of the subsequent act superseded the general provisions of a prior general act. Thus in 1805 a statute was enacted directing the mode of proceeding by attachment on mesne process, and selling by execution shares of debtors in incorporated companies, and by this statute the shares or interest of any person in any turnpike, bridge, canal, *or other company*, then before incorporated, or which might be incorporated, might be attached, &c., and directed the mode of proceeding, &c. In 1807 a fire insurance company was incorporated, and the property of any member of stock was made liable to attachment, and a

(*a*) *Starkweather* v. *Howe*, 17 Mass. 240.

mode of proceeding varied from the directions of the general statute was prescribed, and a question was made, whether the attachment and levy should have been according to the mode prescribed by the general act, or as prescribed by the subsequent act of incorporation, and it was held the latter must govern. It was made a matter of some doubt by the court, whether the former general statute was intended to apply to corporations so dissimilar in the condition and mangement of their property as turnpikes, &c. were, when compared with banks and insurance companies, and that it might be, the *other companies* mentioned in the general statute, were other *like* companies instituted for those definite and permanent establishments, and not monied institutions; which doubt was strengthened by the fact, that the several statutes by which institutions for banks and insurance companies were incorporated, as well before as since the passage of the general act, contained provisions regulating attachments on executions, by which the shares were to be trnsferred. But whether this might be considered as a legislative construction of the term *other companies* or not, the latter statute must be regarded as settling the rule of proceeding. This particular mode provided for in the incorporating act, might be considered in the nature of a special privilege, and a designed variance from the general rule.(*a*)

§ 781. In another case this rule was extended to a case, where the general statute was passed subsequent to the incorporating act, so far as it regarded rights acquired by performance of a condition provided for in the first act; and it was held, that even in that case, the former act which contained the grant was to govern, and that the general statute did not supersede the private

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(*a*) *Titcomb* v. *Union Insurance Company*, 8 Mass. R. 326.

act.(*a*) The decision in this case may at first impression seem in conflict with that in the case of *Starkweather* against *Howe*, above cited. The distinction which governed in this case, seems to have been the fact, that the act of incorporation giving the right to toll, upon the performance of certain acts specified in the act of creation, which had been complied with, and the right having thus become vested, was not affected by subsequent provisions of a general character.

§ 782. Where a statute does not, in express terms, annul a right or power given to a corporation by a previous act, but only confers the same rights and powers upon the same corporation under a new name, and with additional powers, such subsequent act does not annul the rights and powers given to the corporation under the former act and under its former name.(*b*) In another case it has been held, that where, upon the trustees of a local corporation, were conferred by law the powers of certain officers, as defined by a general act of the legislature, and such general act was subsequently revised and re-enacted, though with alterations, repealing the former act, the power of such trustees did not cease; but that, on the contrary thereof, they possessed all the powers conferred, and were subject to all the duties expressed by the revised act, upon the class of officers, in reference to whose powers and duties their own were originally declared and set forth, as the same were applicable to the corporation they represented.(*c*)

§ 783. Where the provisions of a revising statute are to take effect at a future period, and the statute contains a clause repealing the former statute upon the same subject, the repealing clause does not take effect until the

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(*a*) *Nichols* v. *Bertram*, 3 Pick. 344.
(*b*) *The Commonwealth* v. *Worcester*, 3 Pick. R. 474.
(*c*) *Mitchell* v. *Halsey*, 15 Wend. 241.

other provisions of the repealing act come into operation.(*a*)

§ 784. Where a statute contains a provision saving from repeal a part of a former statute which had been already repealed, such a provision will be regarded as a nullity, and will not operate as a revivor of the repealed clause thus attempted to be saved. The court, in such a case, will regard the saving clause as improvident, and will presume that the legislature had overlooked the fact that the clause thus attempted to be saved from the effect of a repeal, had in fact already been repealed by a previous statute.(*b*)

§ 785. Where some parts of a revised statute are omitted in the revising act, the parts omitted are not to be deemed as revived by construction, but are to be considered as annulled. Thus, in *Bartlett* v. *King*,(*c*) it was held that a statute of 1754, concerning donations and bequests to pious and charitable uses, was not in force, and that on the gronnd that the legislature had in 1785 legislated upon the same subject, and had omitted to reenact the provision of the former statute. In one case(*d*) a question arose, whether a parol lease for a year was valid under the statute of 1783, c. 27, sec. 1, which declared that all leases by parol, and not put in writing, and signed by the parties so making the same, should have the force and effect of leases at will only. It was argued that a judicial construction had been put upon an English statute, nearly similar, in which it had been held that parol leases, for an uncertain time, with a reservation of an annual rent, might be good as leases from

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(*a*) *Spalding* v. *Alford*, 1 Pick R. 33.
(*b*) See *Ashley, appellant*, 4 Pick. R. 21.
(*c*) 12 Mass. 537.
(*d*) *Ellis* v. *Paige*, 1 Pick. 43.

year to year, notwithstanding the statute; and as the legislature had adopted the same language, it must have intended to have adopted the same construction. It was held that this argument would have had weight if the statutes had been in all respects similar; but that the English statute had an exception in favor of parol leases not exceeding the term of three years, which had been adopted in the provincial statutes. The omission of this exception in the act under consideration, showed an intent of the legislature to place all parol leases on the same footing. The court admitted the rule that we have laid down, and assign as a reason for it, that to hold otherwise would be to impute to the legislature gross carelessness or ignorance, which was not admissible. The court were not at liberty to suppose that the proviso or exception in the previous statute was omitted by mistake, and if not, then it was clearly the intention of the legislature to place all parol leases on the same footing.(*a*)

§ 786. If a revising statute embrace all the provisions of antecedent laws on the same subject, and reduce them to one system, such revising statute virtually repeals the statutes revised, without any express provision to that effect.(*b*) The rule is thus laid down in one case.(*c*) A subsequent statute, revising the whole subject-matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, on principles of law, as well as on reason and common sense, operate to repeal the former.

§ 787. The same principle obtains where a statute revises the common law. This rule was laid down in

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(*a*) See *Bullard* v. *Mendon*, 1 Pick. 154.
(*b*) *Goodenow* v. *Buttrick*, 7 Mass. R. 142.
(*c*) *Bartlett* v. *King*, 12 Mass. R. 545.

Commonwealth v. *Cooley*.(*a*) The statute then under consideration was one relating to the disinterring of dead bodies; and on an indictment it was contended, that the offence was not one at common law; but that if it was, the common law on that subject had been superseded by a statute of 1814, covering the entire ground. The court held, that although the offence was indictable by the common law, yet that the statute in question had superseded the common law, inasmuch as the whole subject had been revised by the legislature. A statute is impliedly repealed by a subsequent one, revising the whole subject-matter of the first; and that in the case of a statute revising the common law, the implication was at least equally strong. In this case it was doubted whether a repeal of a statute which superseded the common law would revive the then existing common law.(*b*) The same principle is applied in those cases where a statute covers the whole subject-matter of all English statutes adopted here.(*c*)

§ 788. As a general rule, a subsequent statute will control the provisions of a former statute which are repugnant to it according to its strict letter.(*d*) We have already seen that it makes no difference in the controlling operation of the latter statute, that it is general and the other special. But there are exceptions to the rule, depending on the construction of the last statute, which must be made agreeable to the intention of the legislature; and whenever it is satisfactorily discovered that the legislature did not intend that the subsequent act should repeal the former, it will not be held to operate as a repeal. An illustration of this exception will be

(*a*) 10 Pick. R. 39.
(*b*) See 11 Ibid. 351.
(*c*) *Mason* v. *Waite*, 1 Pick. 452.
(*d*) *Pease* v. *Whiting*, 5 Mass. 380.

found in several adjudicated cases.(*a*) In the former of the cases cited, one town had been set off from another, on condition that certain lands in the town from which it was set off should not be taxed in the latter; and the act of incorporation was made upon that condition. A subsequent general tax law, although in its general terms it included those lands, was held not to operate as a repeal of the former provision, as such was evidently not the intention of the legislature. In *Vinten* v. *Welsh*,(*b*) it was held, that where a statute gave an authority to erect a dam across a river, it would not *per se* operate as a repeal of a former statute providing for passage ways for fish through all dams. In answer to the position that the former act had been virtually repealed by the latter statute, which gave authority to stop the waters in the pond by means of dams across the river, the court held, that there was no express repeal, nor any strong implication of it, because the object of the two statutes were not necessarily inconsistent. The legislature, without doubt, meant to give the same right in the dams to be erected which the proprietors of other dams had—that is, to maintain them, subject only to the inconvenience of keeping open a passage for fish during a small portion of the year; and as this was the evident intention of the legislature, they could see no ground to suppose the authority contained in the latter statute operated as a repeal of the provisions of the former one relative to the passage of fish.

§ 789. The suspension of a statute for a limited time is not a repeal of it.(*c*) This rule was adopted and applied in the case cited, which was an action under a sta-

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(*a*) *Capen* v. *Glover*, 4 Mass. R. 305; *Pease* v. *Whitney*, 5 Mass. 380.

(*b*) 9 Pick. 87.

(*c*) *Brown* v. *Barry*, 3 Dallas, 365.

tute of 1748, relative to bills of exchange, on a bill drawn 11th February, 1793. It was insisted, that the act of the legislature of Virginia, on which the action was founded, was not in force when the bill was drawn, and it was made a question whether two subsequent acts passed—to wit, one in November, 1782, declaring the repeal of the act of 1748, and another of December, 1792, declaring a suspension of that repeal till October, 1793—did in fact repeal, and leave repealed the act of 1748. That it did so, it was contended that such must have been the effect, as ascertained and limited by two other statutes—one of 1787, declaring that a repeal of a repealing act should not revive the act first repealed, and another act of 1785, declaring that statutes should take effect from the day on which they in fact passed, unless another day was named. But it was held, that the act of 1748 remained in force. 1. Because the act suspending the repealing act of November, 1792, was not within the act of 1789, which declared that a repeal of a repealing act should not revive the act first repealed, and that for the reason that a suspension of a repealing act for a limited time, was not a repeal of such repealing act. 2. Because the repealing act and the act suspending it—acts of the same session—were, according to the British rule of construing statutes, parts of the same act, and had effect from the same day, that when taken together as parts of the same act, they amounted only to a provision that a repeal of the act of 1748 should take place at a day then future. The act of 1785, declaring the commencement of acts to be from the day on which they in fact passed, did not apply to this case, for the reason that it was provided in the act of 1789; that where a question should arise, whether a law passed during any session changes or repeals a former law during the same session, (which was the present case,) the same construction should be made as if the act of 1785 had never been

passed; that is, both acts being of the same session, should have the same commencement—that is, according to the old English rule, on the first day of the session. 3. Because the manifest intent of the suspending act was, that the act repealed by the repealing act should continue in force till a day then future, the 1st October, 1793. It could have no other intent. The intention of the legislature, when discovered, must prevail, any rule of construction declared by previous acts to the contrary notwithstanding.

§ 790. A statute cannot be repealed by non-user.(*a*) But though *non-user* can never repeal the words of an act when they are plain, yet a series of practice, without any exception, goes a great way to explain an act where there is any ambiguity. Thus where under a statute there had been a constant practice not to file an affidavit, the court thought such an act unnecessary.(*b*) A great moral influence, *non-user* will always have. In Scotland the instances are frequent, where statutes have been deemed to have become obsolete by desuetude. This principle, however, has not been engrafted upon our system of laws. A statute may be repealed by the express words of a subsequent statute, and it has been said it may be by implication; our courts, however, do not favor repeals by implication. In England, it is said, an act cannot be repealed in the same session in which it is passed, unless there be a clause inserted, expressly reserving the power to do so.(*c*) This rule we apprehend is not adopted in this country. If a subsequent statute contrary to a former act, have negative words, it will repeal the former statute. Every affirmative statute is

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(*a*) *White* v. *Boot*, 2 T. R. 275.
(*d*) *Leigh* v. *Kent*, 3 T. R. 362.
(*c*) Steph. L. E. 12.

a repeal, by implication, of a precedent affirmative statute, so far as it is contrary thereto; for "*leges posteriores contrarias abrogant.*"(*a*)

§ 791. The repeal may be absolute though the repealing act be only temporary in its substantial provisions.(*b*) If a statute have been repealed by three different statutes, and only two of the repealing statutes are repealed, the third continues in force and repeals the original statute.(*c*) If a statute be repealed, all acts done under it while in force are good, but if a statute be declared to be null, all acts done under it while it was in force are void.(*d*) If a statute which has been repealed be afterwards revived, the repealing statute becomes of no force.(*e*) By a repeal of a repealing statute, the original statute is revived.(*f*) A constructive revival of a statute cannot operate on any part of an act which has been expressly altered.(*g*) It has been said that the *expiration* of a repealing statute does not necessarily revive the original statute, unless it appears clearly that such was the intention of the legislature.(*h*) But the expiration of a repealing statute by its own limitations revives a statute which had been repealed and supplied by it.(*i*)

§ 792. We shall conclude this chapter by succinctly stating some of the rules which obtained under the

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(*a*) *Surties* v. *Ellison*, 9 B. & C. 752; *Maggs* v. *Hunt*, 4 Bing. 212; *Kay* v. *Goodwin*, 6 Bing. 582.

(*b*) *The King* v. *Rogers*, 10 East, 569.

(*c*) *The Bishop's case*, 12 Rep. 7.

(*d*) Jenk. 233, pl. 6.

(*e*) 2 Inst. 686.

(*f*) *The Bishop's case*, 12 Rep. 7; 2 Inst. 686; *Wheeler* v. *Roberts*, 7 Cowen, 536.

(*g*) *Chancellor's case*, 1 Bland. 663; *Wheeler* v. *Roberts*, 7 Cowen, 536; *Finch* v. *McDowell*, 7 Cowen, 537.

(*h*) Bac. Abr. 225, tit. Statute, D.; *Warren* v. *Windle*, 3 East, 212.

(*i*) See *Chancellor's case*, 1 Bland. R. 664.

civil law in reference to collision between laws. We would remark, however, that those rules are such as are to be observed as rules of conduct rather than as rules of construction; yet their consideration might have some degree of influence upon the mind of a court in construing contrarient statutes in *pari materia*, or conflicting provisions in different parts of the same statute. We do not here allude to collisions between positive laws and the laws of nature, for in all such cases, according to civil law writers, the latter is deemed as paramount. By collision between two laws, we mean those cases which may occur in which it is impossible that both shall stand at the same time. Where there is but a partial conflict between two positive laws they may to a certain extent both stand, and the one must yield to the other only in those points where the repugnancy is so great that one or the other must fall. In all cases what is merely permissive if found incompatible with what is positively prescribed, must yield to the latter. The reason assigned for this is, that mere permission imposes no obligation to do or not to do; what is permitted is left to our option, we are at liberty to do it or not. But we have not the same liberty with respect to what is positively prescribed; we are obliged to do that. Nor can the bare permission in the former case interfere with the discharge of an absolute obligation in the latter, but on the contrary, that which was before permitted in general, ceases to be so in this particular instance, where we cannot take advantage of the permission without violating a positive duty.

§ 793. In the same manner, and by parity of reason, the law which permits ought to give way to the law which forbids, for the obvious reason, the prohibition must be obeyed; and what was in its own nature, or in general permitted, must not be attempted when it cannot be done without contravening a prohibition. The per-

mission in that case ceases to be available. So too it is said, all circumstances being equal, the law which ordains must give way to the law which forbids. This rule, however, is qualified by the fact, "all circumstances being otherwise equal," for many other reasons may occur, which will authorize an exception being made to a prohibitory law. The rules are general; each relates to an abstract idea, and shows what follows from that idea, without derogating the other rules. Upon this footing, it is evident that in general if we cannot obey an injunctive law, without violating a prohibitory one, we should abstain from fulfilling the former, for the prohibition is absolute in itself, whereas every precept, every injunction, is in its own nature conditional, and supposes the power, or a favorable opportunity of doing what is prescribed. Now when that cannot be accomplished without contravening a prohibition, the opportunity is wanting, and this collision of laws produces a moral impossibility of acting; for what is prescribed in general, is no longer so in the case where it cannot be done without committing an action which is forbidden.

§ 794. The date of laws furnish new reasons for establishing the exception in cases of collision. If the collision happen between two affirmative laws of different dates, that which is of more recent date claims the preference over the older one, for it is evident that since both laws emanated from the same source, the subsequent speaks the last mind of the maker, and is capable of derogating from the former. Of two laws, (all circumstances being equal,) we ought to prefer the one which is less general to that which is more definite and specific in its provisions; because that which is special admits of fewer exceptions than that which is general; it is enjoined with greater precision, and appears to have been more pointedly intended. Puffendorf gives us a familiar illustration of this rule. He says:—"One law

forbids us to appear in public with arms on holidays; another law commands us to turn out under arms, and repair to our post as soon as we hear the sound of the alarm bell; the alarm bell is rung on a holiday. In such cases we must obey the latter of the two laws, which creates an exception to the former."(*a*) All circumstances being equal, what is enjoined under a penalty claims a preference over what is not enforced by one; and what is enjoined under a greater penalty, over that which is enforced by a lesser, for the penal sanctions give additional force to the obligation; they prove the object in question was more earnestly desired, and the more so in proportion as the penalty is more or less severe. The application of these general rules of conduct to a question of construction to contrarient laws or statutory provisions, will readily be perceived, and they may serve to some extent as a beacon light to those upon whom is devolved the duty of construing conflicting enactments.

(*a*) Jus Gent. lib. 5, ch. 12, sec. 23.

CHAPTER XX.

OF PUBLIC AND PRIVATE STATUTES.

§ 795. We have in a previous chapter remarked, that statutes are divided into two classes—that of public and private acts. This distinction is important in all cases in the determination of the question as to whether an act must be specially pleaded, as it is a general rule that public acts of parliament are to be taken notice of judicially by the court, without being formally set forth; but particular or private acts, are not regarded by the judges unless formally shown and pleaded. The general description of public acts is, that they relate to or concern the interest of the public at large, or relate to a general *genus* in relation to things; and private acts relate to private individuals or an individual only, or which concern a particular *species* of such general genus or thing.

§ 796. In legal language, acts are deemed public; and general acts, which the judges will take notice of in pleading—acts concerning the king, queen or prince, or in our American states, the government and its co-ordinate departments; those concerning all prelates, nobles, and all public officers; those concerning the whole spirituality, and those which concern all officers in general; acts concerning trade in general, or any specific trade; acts which relate to all the subjects of the realm; acts concerning all persons generally, though it be a special or particular thing, such as statutes concerning assizes, or woods in forest, chases, fisheries, and private acts,

when recognized by a public act. Private acts are those which concern only a particular species, thing or person, of which the judges will not take notice without pleading them—such as acts relating to bishops only, acts for toleration for dissenters, acts relating to any particular place, or to divers particular towns, or to one or divers particular counties, or to the colleges only in the universities.

§ 797. In parliamentary language, another sort of distinction is also used, and some acts are called public general acts, and often others public local acts, such as church acts, canal acts, &c. These, in their objects and operations, are merely local or limited, but they are nevertheless treated as public acts, either by virtue of a special clause declaring them to be so, or because, although limited to a particular section or locality, yet they affect the public at large when acting within that section or locality, in reference to matter within the purview of the act. To this class may also be added some acts which, though public, are merely personal, such as acts of attainder, and patent acts, and all that class of acts which have for their object the security of the right of some particular individuals or class of persons, but which, in effect, are operative, and of binding force upon all the citizens generally. Other acts are called private acts, of which latter class some are local, such as enclosure acts, &c., and all that class of acts of a private character which relate to a particular locality, place or district, and some personal, such as relate to the names of particular individuals or to particular estates, as special acts of divorce, or other matters affecting only a particular person or class of persons.(*a*)

§ 798. In *Holland's case*,(*b*) it is said, "The rule of

(*a*) Bacon's Ab. Statutes.

(*b*) 4 Co. 76, *a*.

law is, that of general statutes the judges ought to take notice, although not pleaded—otherwise of special or particular statutes; and for the better understanding of the point as to which are *statutum generale* and which are *statutum speciale*, that, *generale dicitur a genere, et speciale a specie;* and these are *genus*, *species*, *et individua:* for instance, spirituality is *genus*; bishopric, deanery, &c., are *species;* and bishopric, or deanery of a particular place, as Norwich, *individuum sic dicet quia in partes dividi nequit.*" Hence acts which concern the whole spirituality in general, are general acts, and the act(*a*) concerning colleges in the two universities, and the colleges of Eaton and Winchester, is a particular act, of which the judges shall not take notice; but the statutes concerning colleges, deans and chapters, hospitals, parsons, vicar, or any other having any spiritual or ecclesiastical living, are general acts.(*b*) A statute concerning leases made by bishops, is a special act, because it concerns the bishops only, who are but species of the spirituality, or an individual of a certain species, as a particular bishop. So the word officer is a general word or *genus*, sheriff is a special word or species, and the sheriff of a particular place, as of Norfolk, is *individuum*. Hence a statute which declares that no sheriff, nor other of the king's officers, shall take any reward to do his office, but shall be paid of that which they take of the king, is a general act, because it extends to officers in general; but at one time it was held, that a statute which extends only to sheriffs was but a particular and special act. This doctrine has since been overruled, and this is now held to be a public act.(*c*) So, mystery or trade is a gen-

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(*a*) 18 Eliz. c. 6.

(*b*) *Dumpsor's case*, 4 Co. 120.

(*c*) See 2 Lev. 154; 1 Ibid. 83; Sid. 23; *Samuel* v. *Evans*, 2 T. R. 569; *Lovell* v. *Sheriff of London*, 15 East, 320.

eral word; trade of a particular kind, as grocery, is special, and this grocer by name is *individuum*; and hence acts concerning mysteries or trades in general are general acts, but an act concerning a particular trade, as that grocery, is a special act, as it is said,(*a*) because the trade of grocers contains under it but *individua*, or singular persons, as this or that grocer by name. The distinction between statutes which concern trade in general, and those which relate to a particular trade, is, that in the former the *genus* trade is composed of all kinds of trade, but in the latter the particular trade is a *species* of the *genus* trade, and the particular person is an individual of that species.

§ 799. It has been held that the statutes made in the time of Henry 6th, by which all corporations and licenses granted by that prince are declared void, was a private act, for the reason that it did not extend to all corporations: it was not general, but particular in a generality, or, to speak with more propriety, general in a particularity. The *genus* corporations was general; the *species*—to wit, those granted by this prince—were particular or special. As it is the *species* and not the *genus* provided for in the act, it rendered the act itself a private act.(*b*)

§ 800. If an act is special which extends *ad species*, *a multo fortiori*, it is special or particular when it extends *ad individua*. As to what acts as to persons are general, and what not, it may be observed, that although the matter is special, so that under it there be but *individua*, yet if it is general as to persons, it is a general act; but if the act concerns *aliquod singulare sua individuum*, although it is general as to persons, yet it is a special act, of which the judges will not take notice. An appeal is

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(*a*) Dyer, 27.
(*b*) Plow. 65; 4 Rep. 76; Dyer, 119.

a special act, and yet statutes giving appeals to all persons are general acts. But if an act should provide that no appeal should be brought of the death of S., that would be a special or particular act.

§ 801. It is upon the same reasoning that statutes of waste, and concerning special actions, assizes, assizes by tenant by elegit, of attaints, &c., are general laws, although they concern special actions and are framed in reference to special objects. Although an act as to persons is general, if the matter thereof concerns *individua*, or singular things, or any particular man or house, &c., or all the manor houses, &c., which are in one or sundry particular towns, or in one or divers particular counties; these are such particular acts of which courts will not take cognizance, without they are specially pleaded or alleged. But of every act, although the matters thereof concerns *individua*, or *singular* things, yet if they touch or affect the king or government at heart, they are public acts, of which the judges *ex officio* ought to take cognizance; for every subject has an interest in the king as in the head of the commonwealth; and as the inferior members cannot estrange themselves from the actions and passions of the head, no less can any subject estrange himself from any thing which touches or concerns the king, their supreme head.(*a*)

§ 802. It has been said, that the distinction between public and private statutes is this, a general or public act is a universal rule that regards the whole community, but special or private acts are rather exceptions than rules, being those which operate upon private persons and private concerns.(*b*) It is not necessary, however, in order to constitute a statute a public act, that it should be equally applicable to all parts of the state. It is suffi-

(*a*) Phil. Ev. 318; Bull. N. P. 222.
(*b*) 1 Black. Com. 86.

cient if it extends to all persons doing or omitting to do an act within the territorial limits described in the statute.(*a*)

§ 803. In the case last cited, the act provided for the survey of timber in the county of Penobscot, and prohibited sales unless thus surveyed and marked, but as it was operative upon all persons, it was held to be a public act. On the same principle, and for the same reasons, an act for the preservation of fish called bass in Dunstan river, in Scarborough in the county of Cumberberland, was held to be a public act.(*b*) In this case it was said, indeed all the laws regulating the taking of fish are made for the public benefit, to preserve fish, and are public statutes.

§ 804. If a statute contain provisions which are of a private nature, yet if it also contains provisions for the forfeiture of penalties to the state, or for the punishment of public offences, it is a public statute.(*c*) In *Rex* v. *Bagg*, the defendant was indicted under the statute 2 Phil. & Mar. ch. 11, for using the trade of a dyer and weaver, not being a cloth maker. It was objected that the indictment was not good, because the act was private and not set out in the indictment. It was held it was so if the act had been private, but that although this concerned a particular thing or was private in its nature, yet that the forfeiture being to the king, and so the king concerned, that this made it a public act.

§ 805. In *Rogers' case*, the defendant was indicted for having in his possession forged and counterfeit bills, purporting to be issued by the Bank of the United States. It was objected that the judge admitted in evidence a printed copy of the act of congress, and that the act was

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(*a*) *Pierce* v. *Kimball*, 9 Greenlf. R. 54.

(*b*) 5 Mass. R. 268.

(*c*) Case of *Rogers*, 2 Greenlf. R. 303 ; *Rex* v. *Bagg*, Skin. 429.

private, and the only question was, whether the act was public or private. The court held, as the bank was established for public purposes, as an important aid in conducting the fiscal concerns of the nation, the United States owned a large portion of its funds, and its bills were receivable in payment of revenues; that although if the statute was of a private nature, or if it concerned a particular trade, yet if a forfeiture thereby be given to the king or government, it was a public statute. That the twelfth and thirteenth sections of the act provided penalties of different amounts for violations of certain parts of the act, and a moiety or less portion was given to the United States, and sections eighteen and nineteen provided punishments to be inflicted on those convicted of counterfeiting, that such provisions were only generally to be found in the public and general statutes; that for these reasons the act was a public act. Upon the same principle it has been held in Massachusetts, that the statute of 1829, c. 2, to regulate the pilotage in the harbor of Boston, is a public act. Shaw, Ch. J., says: "The last objection is, that the statate is a private act and ought to have been recited in the declaration. Without going minutely into this subject, which sometimes involves distinctions of much nicety and difficulty, there is one consideration which renders it decisive that this is a public act, which is, that the first section in terms imposes a penalty upon every person who shall violate its provisions. It is therefore binding upon every citizen of the commonwealth, and upon every stranger who, coming within its jurisdiction, owes a temporary allegiance and is bound by its laws."(*a*)

§ 806. Where the preamble of a statute recited divers mischiefs to the public which arose from want of proper

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(*a*) *Heridia* v. *Ayres*, 12 Pick. 344.

regulations concerning the poor, and it was enacted, for the redress of the mischiefs intended to be remedied, a work-house should be erected in Middlesex, this statute was holden to be a public statute, because it concerned the king's person and the public peace; that a stop should be put to such mischiefs: and the clause for erecting a work-house was holden to be public, because it referred to the mischiefs mentioned in the preamble; a remedy was thereby provided for such mischiefs in the county of Middlesex.(*a*)

§ 807. In *Jones* v. *Axen*,(*b*) in an action of debt on a bond, the defendant plead the statute 22 and 23 Car. 2, c. 20, for discharge of poor prisoners. On demurrer it was objected, that the statute should have been pleaded, as it did not extend to all poor prisoners, but to such only as were in prison at the time mentioned; but it was held a public statute, because all the people of England might be interested as creditors of the prisoners; and it was a charitable act, and ought to receive a favorable construction—and was long and difficult to be pleaded, and poor prisoners could not bear the expense of pleading it specially.

§ 808. The reason why statutes which concern the king are deemed public acts, is, as we have seen, that every subject has an interest in the king or governmental head, who is regarded, and in fact is, the head of the body politic, and consequently every one belonging to that government ought to be sensible of that which affects the crown, just as much as a member of the natural body is of what the head at any time feels or suffers. The same rule, for the same reason, applies with equal force to the government of the United States or to the government of the respective states, and has been adopt-

(*a*) Sid. 209; *Rex* v. *Paulding*, Bacon Ab. Stat. F.
(*b*) 1 Ld. Raymond, 120.

ed and thus applied in this country. A turnpike act incorporating a company, with a clause vesting the road, on a certain event, in the people, is a public act.(*a*) In the case last cited, Lansing, Chancellor, says: "Amongst the English legal maxims, we find that *every statute that concerns the king, and every statute that relates to all the subjects of the realm*, are public statutes. All highways, as contradistinguished from private ways, are common to all the people of the state, and concern them generally. A new creation of a highway, or a new modification of an ancient way, as in the case of a turnpike, does not affect the mode of using it generally. It is still a highway, in the preservation of which all citizens are interested. It contributes essentially to their convenience. The toll is merely exactable for its construction, maintenance and repair. In all other respects, the right of using it as a highway is unimpaired. The people of the state, who, in their collective capacity, have succeeded to the right of sovereignty, are also entitled to the reservation after the sums charged on the turnpike are satisfied. These considerations rather incline us to think that this statute ought to be considered as a public act."

§ 809. In one case(*b*) it was urged, that there was no public law establishing an office of the Bank of Utica at Canandaigua, and that the act of 10th April, 1815, authorizing the bank to establish an office at Canandaigua, was a private act. The chancellor said: "The act incorporating the Bank of Utica is declared to be a public act, and the action is against this bank. But I am not prepared to admit that a law incorporating a bank, without declaring the law to be a public law, is a private act, which must be recited in every suit against a corpo-

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(*a*) *Jenkins* v. *Union Turnpike Co.* 1 Caines' Cas. 86.

(*b*) *The Bank of Utica* v. *Smeeds*, 3 Cow. R. 684.

ration. These institutions are public in their nature and character, and their operations affect the whole community." Neither the chancellor or the court did, however, in this case, decide upon the point that this was a public act. It is, however, now provided by statute 2 R. S. 374, sec. 3, in all suits brought by a corporation created by or under any statute of this state, it shall not be necessary to prove, on the trial of the cause, the existence of such corporation, unless the defendant shall have pleaded in abatement or in bar, that the plaintiffs are not a corporation. And it is also provided, in actions by or against any corporation created by or under any law of this state, it shall not be necessary to recite the act or acts of incorporation, or the proceeding by which such corporation was created, or to set forth the substance; but the same may be pleaded by the reciting the title of such act and the date of its passage.(*a*) In Missouri it has been held, that the act of the legislature incorporating the Bank of Missouri is a public act, and that, although not signed by the president of the legislative council.(*b*) In Massachusetts, acts creating public corporations, whether sole or aggregate, are public statutes of which the courts are judicially informed.(*c*) The act of Virginia incorporating the Bank of Alexandria was held to be a public law.(*d*)

§ 810. If a private act be recognized as existing by a public statute, in unequivocal language, it thereby makes such private act a public one.(*e*) Thus in *Rogers' case*, the defendant had been convicted of uttering, as true,

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(*a*) 2 R. S. 375, sec. 13.

(*b*) *Douglass* v. *Bank of Missouri*, 1 Mis. R. 24.

(*c*) *Portsmouth Livery Co.* v. *Watson*, 10 Mass. 91, 92.

(*d*) *Young* v. *Bank of Alexandria*, 4 Cranch R. 384.

(*e*) *Rogers' case*, 2 Greenl. R. 301; *Samuel* v. *Evans*, 2 D. & E. 569; Buller's N. P. 224; 7 Bacon Abr. Stat. F. note.

certain false and counterfeit bills of the Kennebeck Bank. A new trial was moved, on the ground that the judge allowed to be read in evidence the printed statute incorporating the bank, which, it was contended, was a private act. The court admitted the act was a private one, but said, "It was a principle of law, that if a public statute, in its language, recognizes the existence of a private statute, it thereby made such private act a public one, which courts of justice may afterwards regard as such. The statute of 1821, ch. 143, had in it, certain provisions relative to any *incorporated bank* within the state, imposing a penalty for not paying bills on demand, and chap. 144 imposed further duties on the *several banks of this state*, that, according to the principles of law before stated, the courts were bound to take notice that there were banks established and incorporated in the state, all of which, being recognized by the statutes quoted, must be considered acts by a legislature authorized to enact them,—which acts, by such recognition, had become public statutes. That it was well known and admitted, that courts of law and all persons were bound to take notice of public statutes, whether published or not. That by looking at the constitution, they learned that all laws enacted by the legislature of Massachusetts, and in force on 15th March, 1820, should remain, and be in force in this state, until altered or repealed by the legislature of Maine. That the repealing act of 1821 did not repeal any act of Massachusetts incorporating this bank, and hence the printed copy of the act was competent evidence."

§ 811. In *Samuel* v. *Evans*, the action was debt upon a bail bond. The defence set up was, that the bond was void under the statute 23 Hen. 6, c. 9, because it appeared to be taken after the return of the writ as stated in the condition; and the question was, whether that act was a private one, so that it should have been plead-

ed. Buller, J. said: "He thought it a general law, for it alludes to all arrests, and every person who is arrested was within the provisions of it, even if the statute of Anne had never passed; but that the point was not now open to consideration; for whatever might have been the law before the statute of Anne, the case of *Saxly* v. *Kirkus*(*a*) removes all doubt. As the court there said, that though the 23 Hen. 6, c. 9, was a private law, yet the statute 4 and 5 Anne, having enabled the sheriff to assign such bond, the court must take notice of the law that enables him to take such bond." This case, it will be perceived, proceeds upon the same principle above alluded to, and in a more extended sense, to wit, that any recognition of a statute of a private nature as a public act will make such private act a public one, although the public act does not in itself in terms refer to or recite the act, in all that class of cases where the act done is recognized and is of such a nature that it could not exist independent of some statute authorizing it. Such was the case in reference to a bail bond taken by the sheriff."

§ 812. Statutes prescribing the limits of counties and towns are public acts. In the case of *The Commonwealth* v. *The Inhabitants of Springfield*,(*b*) the defendants were indicted for not repairing a highway, which it was alleged they ought to repair. On demurrer to the indictment it was objected, that the highway is not alleged either to be in the town of Springfield or in the county of Hampshire. Parsons, Ch. J., said: "The road is described as 'leading from Chicopee road, in the town of Springfied, to the town of South Hadley in said county,' and it is alleged, that two miles in length of the said road, within the said town of Springfield, was and yet

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(*a*) Bul. N. P. 224. (*b*) 7 Mass. R. 9.

is ruinous, to wit, at Springfield, and that the inhabitants of the said town of Springfield in the county aforesaid ought to repair the same. The indictment was drawn without much attention, and the defendants have argued that although in the latter part of the indictment, Springfield is described as within this county, yet the location of the defective part of the road in Springfield aforesaid is insufficient, because the court cannot judicially presume that the whole of that town is within the county; for in fact there are towns which lie part in one county, and part in another county. The objection by the common law of England might prevail, because the judges cannot presume that the whole of a township or parish lies in the same county. In England the limits of the several counties and parishes are not ascertained by public acts of parliament, the records of which are remaining; but they are determined by ancient usage, of which the judges cannot judicially take notice. The case is different in Massachusetts; our county limits, and also the boundaries of our several towns, are prescribed by public statutes, of which we are bound judicially to take notice, when from these limits or boundaries it appears that every part of any town is in the same county, of that fact we can judicially take notice. Now as judges, we know from our several public statutes, that Springfield lies wholly in the county of Hampshire. When, therefore, the indictment alleges, that the inhabitants of the said town of Springfield, in the county of Hampshire, ought to repair, and that the defective road lies in Springfield aforesaid, we can take notice that the defective road lies also in the county of Hampshire."

§ 813. A statute concerning the revenue of the king or government is a public law, but it may be private in respect to some clauses in it relating to a private per-

son.(*a*) The distinction is, that when an act concerns the king's revenue, for the advantage of the king, it is general, and judicial notice will be taken of it; but it is otherwise, when it concerns it only in order to a diminution thereof to the advantage of a particular person, as an act of parliament may be general in part, and particular in other parts.(*b*) An act of congress of the United States for the relief of insolvent debtors in the District of Columbia, as it respects the Union at large, has been held to be a private act, of which the courts were not bound to take notice. This act, as to its extra territorial effect out of that district, stands upon the same footing as do the public acts of a state, which will not be taken notice of judicially by the courts of another state.(*c*)

§ 814. An act which relates to, or which affects a coördinate department or branch of the government of a state or nation, although enacted in reference to a particular locality, and only operative as to that locality, is a public statute. This principle and distinction is recognized in *Morris* v. *Hunt*,(*d*) where it was held, that an act to continue until 1st January, 1819, an act made 51st Geo. 3, to explain and amend the laws touching the election of knight of the shire, to serve in parliament of England, respecting the expenses of hustings and poll clerks, so far as regards the city of Westminster, was a public act, for the reason that it related to a branch of the legislature, and therefore in an action founded on that statute, at the suit of the high bailiff of Westminster, to recover the expenses of erecting a hustings, &c.,

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(*a*) *Shales* v. *Seignoret*, 12 Mod. 249; Bac. Ab. Statute, E.

(*b*) *Ingraham* v. *Foot*, 12 Mod. 613; 10 Co. R. 58.

(*c*) *Wright* v. *Paton*, 10 John. R. 300; *Canal Co.* v. *Railroad Co.*, 1 Gill & John. 63.

(*d*) 1 Chitty R. 453.

on the election of members of parliament, it was determined not to be necessary to produce an examined copy of the act.

§ 815. Many private acts, are made public by virtue of a special clause in the act declaring them to be public acts. Whenever an act contains such a clause, the only effect of such a clause is, that courts are bound judicially to take notice of them, without their being specially pleaded. The act itself does not derive any additional weight or authority from having a clause declaring it to be a public act. It must notwithstanding be construed as are all other private acts, and when it is passed on the petition of individuals it is to be construed as any private agreement between parties. It was held,(*a*) that an act of parliament empowering a bankrupt patentee of a patent right, his executors, administrators, and assigns, to assign the right to a greater number of persons than was allowed by the letters patent, and declared to be a public law, did not enable either the bankrupt or his assignees to make a better title than they could before the act. It was contended that the act of parliament stated in the case, vested a legal interest in the bankrupt, for that he must be taken against all the world, to have that interest which the act of parliament recited, that act being a public act. But Lord Alvanley, Ch. J., held, that though the act was public, it was of a private nature; that the only object of the proviso for making it a public act was, that it might be judicially taken notice of, instead of being specially pleaded, and to save the expense of proving an attested copy; but that it had never been held, that an act of a private nature derives any additional weight or authority from such a proviso. It only affected the brankrupt, and those claiming under

(*a*) *Hesse* v. *Stevenson*, 3 Bos. & Pul. 565.

him, and authorized him to do certain acts, which by the letters patent he could not have done. It recited the letters patent, containing a clause which prevented him from assigning to more than five persons, and then enabled him to assign to any number of persons not exceeding sixty. That it was not possible therefore to consider the act as giving the bankrupt any title which he had not at the time when it was passed. That such was the construction which had always been put upon acts of parliament of this nature. That for this reason no aid was to be derived to the defendant from the act. That private acts when passed on the petition of individuals, are to be construed as any other private agreement between the parties was held in *Perchard* v. *Heywood.*(*a*)

§ 816. Blackstone, under the head of alienation by matters of record,(*b*) speaking of private statutes, says: "Acts of this kind are, however, carried on in both houses with great deliberation and caution, and particularly in the house of lords. They are generally referred to two judges, to examine and report the facts alleged, and to settle all technical forms. Nothing also is done without the consent expressly given of all parties in being, and capable of consent, that have the remotest interest in the matter, unless such consent shall appear to be perversely, without any reason withheld, and as before hinted, an equivalent in money or other estate, is usually settled upon infants, or persons not *in esse*, or not of capacity to act for themselves, who are to be concluded by this act, and a general saving is constantly added at the close of the bill, of the rights and interest of all persons whatsoever, except those whose consent is so given or purchased, and who are therein particu-

(*a*) 8 T. R. 468.

(*b*) 2 Black. Com. 345.

larly named." And he adds: "A law thus made, though it binds all parties to the bill, is looked upon more as a private conveyance than as a solemn act of the legislature."

§ 817. Another important distinction exists, in law, between the force and effect of a *public statute* and one which is private, which is, that a public statute binds and affects all persons, whether named in it or not; but a private statute does not bind or affect strangers, unless there is a clause for that purpose. In England a general saving clause is now always added, at the close of every private act, of the rights and interests of all persons except those whose consent is obtained; and before this practice of inserting the saving clause, it was held that a private act did not bind strangers.(*a*) In *Boswell's case*,(*b*) it was resolved, in the court of wards, that an act of parliament making any conveyance good against the king or other person certain, it should not take away the right of any other, although there be not any saving in the act. The rule laid down in *Boswell's case* above cited has been adopted by our state courts. In *Catlin* v. *Jackson*(*c*) a person had purchased land at sheriff sale, but had not paid the money, and afterwards became attainted. By the act of attainder of 22d October, 1779, estates upon condition did not become forfeited, or vest in the people of the state, and hence the state was not vested with the title to this land. An act was passed authorizing the surveyor-general to convey the property without covenant of warranty. It was held, that this private act of the legislature, directing the property to be sold by

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(*a*) 2 Black. Com. 345; 4 Cru. Dig. 519, 9; *Jackson* v. *Catlin*, 2 J. R. 263.

(*b*) Cited in *Barrington's case*, 8 Co. R. 138, a.

(*c*) 2 J. R. 246.

the surveyor-general without covenant of warranty, and the money to be paid to certain creditors, did not take away the right of third persons, but amounted only to a quit claim of any right or interest of the state. Kent, Ch. J. said: "The act directs only the surveyor-general to sell the land so purchased by Thomas Jones, and to execute a deed without a clause of warranty, but does not declare the operation of the deed as against the rights of Cochran and his heirs. In the language of *Barrington's case*, this act does not make the deed good as against person certain, except it be the state, and therefore shall not take away the rights of any private person. If the act had declared the sale to be a bar to the claim of Cochran, a very serious question would have arisen on the validity of the statute taking away private property without the consent of the owner, and without any public object or any just compensation. In the same case, in the court for the correction of errors,(*a*) the chancellor said "that this was a private act, passed at the instance of the parties, to remove embarrassments in the arrangements of their interest only, which could not affect strangers, or divest the rights of others not parties or privies to it. That it was a species of conveyance which, like all others, the parties take at their peril." In *Coolidge* v. *Williams*,(*b*) Ch. J. Parsons held, that private statutes made for the accommodation of particular citizens or corporations ought not to be construed to affect the rights or privileges of others, unless such construction results from express words or from necessary implication.

§ 818. In *Thomas* v. *Mahan*,(*c*) it was held that

(*a*) 8 J. R. 433.
(*b*) 4 Mass. R. 140.
(*c*) 4 Greenl. 513.

private statutes stand upon the same basis as contracts by deed. In all such cases the rule governs, that all ambiguous words or sentences in a private act of the legislature creating a corporation are to be construed most strongly against the corporation, and in favor of private rights of property.(*a*) In England it has been held that the act 7 Geo. 3, ch. 37, was to be considered as a contract between the respective parties, notwithstanding it was declared to be a public act; for it was passed on the petition of the corporation of London. Lord Hardwick,(*b*) said: "It is a rule that private acts of parliament, introduced only for the settlement of particular estates, ought to be considered only as common conveyances, and directed by the same rules of law, and therefore cannot be taken to extend as a discharge of any persons not mentioned in the act." Lord Hale says: "Every man is so far a party to a private act of parliament as not to gainsay it, but not so as to give up his interest. Suppose an act says, whereas there is a controversy concerning land between A. and B., it is enacted that A. shall enjoy it. This does not bind others, though there be no saving, because it was intended only to end the difference between them here.(*c*) In *Barrington's case*(*d*) it was held that the act 22 E. 4, c. 7, which under certain circumstances authorized the proprietors of grounds in forests, after felling, to enclose them, without the king's license, for seven years, to preserve the opening wood, extended to said grantees, but did not extend to the wood of any subject in which another has a right of common. As it appeared by the preamble, between what persons, and for and

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(*a*) *Scales* v. *Pickney*, 4 Bing. R. 448.
(*b*) *Hornby* v. *Houlditch*, cited in note 1 T. R. 93.
(*c*) *Lucy* v. *Livingston*, 1 Vent. 176.
(*d*) 4 Co. 136.

against what persons this act was made, and the parties to the great contract, by act of parliament, were the subjects having woods, &c. within forests, chases or purlieus of one part, and the king and other owners of forests, chases and purlieus of the other part, so that the commoners were not any of the parties between whom this act was made. That for this reason, it was held, that the right of commoners were not taken away by it.

§ 819. It was held, in the case before cited,(*a*) that there was a manifest distinction between a public statute, which was of universal concernment and obligation, and presented a rule of action to all, and the grant by the legislature, or a private act granting certain chartered privileges to an individual, or to be executed by a person appointed for that purpose. That the former was a declaration of the sovereign will, and when constitutionally proclaimed, it became binding upon all the citizens, without any subsequent assent on their part, express or implied; but that such was not the effect of a grant or charter of privileges to individuals, or of any private act, to be executed in the manner prescribed. Such an act, though passed with all the constitutional sanctions, possessed no binding force, even on the grantees of such chartered privileges, unless expressly or by implication accepted by them; or in those appointed to carry its provisions into execution, until they have accepted the appointment, and subjected themselves to a legal obligation to perform the duties it imposes—then, and not otherwise, it is in effectual operation; and that, simply, because the act is in the nature of a contract, to the per-

(*a*) *Thomas* v. *Mahan*, 4 Greenl. R. 513.

fection of which the assent of two or more minds is always necessary.

§ 820. There are certain exceptions to the rule that a private act will only bind those named in it, depending, however, upon some special reasons. It has been held that a private act will bar an estate tail, and all remainders expectant thereon, and also the reversion, although the rights of the remainder were not excepted out of the saving clause. Lord Apsley(*a*) held this rule; and that, as it was clear that Robert Westly, being tenant in tail of the Yorkshire estate, the right of those in remainder was, by the act of parliament, barred under an act obtained on the application of Westly and the heirs-at-law, who were infants, for the reason that he, being tenant in tail, might have barred the remainder by a recovery; and that, for this reason, it was different from the case where a tenant for life procured a private act of parliament for the exchange of livings. That being tenant for life only in such a case, the right of those in remainder not being excepted out of the saving clause, they were not bound by the act.

§ 821. Another distinction between a public and private act to be noted is, that in the construction of a public act, all other statutes relative to the same subject-matter *in pari materia* are to be considered in construing the act, but in the construction of a private statute it is not proper to resort to the language of any other private statute relating to the same subject-matter—and this for the reason that a private statute stands upon the same basis with a contract by deed, which generally are not to be affected by evidence *aliunde;* and also for the reason that an individual who receives a grant from the le-

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(*a*) *Westby* v. *Kierman*, 2 Ambl. 697.

gislature, or when a private act is passed for his benefit, is not bound to look into and carefully examine the language of all other grants and private acts, in order to ascertain the true meaning of the grant or act made for his benefit.(*a*)

(*a*) *Thomas* v. *Mahan*, 4 Greenl. R. 513.

CHAPTER XXI.

OF THE PROOF OF THE EXISTENCE OF STATUTES.

§ 822. In ancient times, when acts of parliament were made, to the end that the same might be published and understood, especially before the use of printing, they were engrossed upon parchment, and bundled up together, with a writ in the king's name, under the great seal, directed to the sheriff of every county, sometimes written in Latin, and sometimes in French, commanding the sheriffs to proclaim the same in his bailiwick, as well within liberties as without. Such continued the course of proceeding even after printing came into use, as late as until the reign of Henry VII.

§ 823. We have seen in a previous chapter, that in England, notwithstanding the record of a statute may not be extant, so that resort cannot be had to that species of evidence, yet that general statutes, made within the time of memory, that is, since 1 Rich. I., do not lose the force of statutes, if any authentic memorials of their being such are to be found in books, seconded with a general received tradition attesting and approving the same. In conformity perhaps with this favorable presumption, it has become a rule, that courts are to take notice of general acts of parliament without pleading them; for statutes are never to be put in issue on a plea of *nul tiel record*, but are to be tried by the court, and if there be any difficulty or uncertainty, the judges are to make use of ancient copies, transcripts, books, pleadings, or any other memorials, to inform themselves.

§ 824. In 8th Coke(*a*) it was resolved that against a general act of parliament, or such an act whereof the judges *ex officio* ought to take notice, the other party cannot plead *nul tiel record;* for of such an act the judges ought to take notice; but if it be misrecited, the party ought to demur in law upon it. And in that case the law is grounded upon great reason, for it is in that case said, God forbid, if the record of such act be lost, or consumed by fire, or other means, that it should tend to the general prejudice of the commonwealth, but rather although it be lost or consumed, the judges, either by the printed copy, or by the record in which it is pleaded, or by other means may inform themselves of it. In England in the case of *Rex* v. *Arundel*,(*b*) it was held, that a statute should not be proven by a journal of parliament, nor should it in that way be shown that the assent of the house of commons was conditional. And now by statute 41 Geo. 3, c. 90, sec. 9, it is declared that copies of the statutes of Great Britain and Ireland, prior to the union, printed by the printer duly authorized, shall be received mutually as *conclusive evidence* of the several statutes in the courts of either kingdom.

§ 825. In several of the states of this Union similar provisions are made by statute, that printed copies of the statutes published under authority shall be evidence of public statutes. These statutory provisions in the several states will be hereafter referred to and stated, so far as we have been enabled to collect the same. In regard to the general rule, that public acts of parliament are to be taken notice of judicially by the courts of law without being formerly set forth, a distinction is to be taken between those acts which are public and those which are private. It is in reference to the former, and

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(*a*) Rep. 28. (*b*) Hob. 110.

not to the latter, that this rule obtains.(*a*) As to what acts are public and what private, has been considered in another chapter. Courts will not only notice the tenor of a public statute, but also the time of its passage, as well as the passage of contemporaneous public statutes. Savage, J., in one case recognized this rule, and intimated, that as the court were to take notice of all public acts, he was inclined to think, that under a plea of an insolvent's discharge as against the people of the state, as the court were bound to take notice of all public acts, they therefore knew that the law giving clerk's fees to the people was passed at the same session with the insolvent act, and the services in that case necessarily were rendered after the passage of the insolvent act.(*b*)

§ 826. Independent of the act authorizing a printed statute to be given in evidence in New York, it has been held, that a printed statute, containing a private act, may be given in evidence against one in whose favor it was passed;(*c*) although in the same case it was held, that the printed statute book is not evidence of a private act. The rule that the statute book is only evidence of public statutes, was in this state changed by statute, sess. 34, c. 246, sec. 46, in which it was provided: "All private acts, passed or to be passed by the legislature, and printed by the printer of the state, shall and may be read in evidence in all cases, and in all courts in this state, from the printed statute book, any law or usage to the contrary notwithstanding. And under the revised statutes, "*All laws*, passed by the legislature, may be read in evidence from the volume printed by the state printer, in all courts of justice in this state, and all proceedings

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(*a*) 1 Phil. Ev. 328 · Comyn's Dig. tit. Parliament, R. 5, 6; Bac. Ab. tit. Statute, L. 2; *Holland's case*, 4 Co. 76; 2 Roll. Ab. 466; 2 Mod. R. 57.

(*b*) *The People* v. *Herkimer*, 4 Cow. R. 348.

(*c*) *Duncan* v. *Dubois*, 3 John. Cas. 125.

before any officer, body, or board, in which it shall be thought necessary to refer thereto."(*a*) This act of course includes all private as well as public acts. And all laws published by the state printer may be read in evidence from the paper in which it shall be contained, in all such cases, until three months after the close of the session in which it became a law.(*b*)

§ 827. In Indiana, under their statutes, the printed statute books of the state, and of the late territories of Indiana and Illinois, purporting to be printed under the authority of the state or territory, are evidence of the *private* acts therein contained. And the printed statute book of any state or territory of the Union, purporting to be printed under the authority of such state or territory, are *prima facie* evidence of the public and private acts contained in them.(*c*) Prior to these statutory provisions, the courts there took notice of public acts of that state or territory, although it did not of the laws of a foreign state, unless pleaded and proved.(*d*)

§ 828. In that state, notwithstanding the statute, private acts are not noticed by the courts, unless their contents are set out in the pleadings, a mere reference to them is insufficient. They are regarded in pleadings as matter of fact, the existence of which may denied by plea.(*e*) It has also been held, that by virtue of the act of February 17, 1838, the printed statute book of any of the states of the Union, purporting to be published by authority, are made *prima facie* evidence in the courts of that state, of the laws published in them; were it not

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(*a*) 1 R. S. 2d ed., 168, sec. 12.

(*b*) Id. sec. 11.

(*c*) Statutes Ind. 1834, p. 79; Rev. Stat. Ind. 1838, p. 273; 4 Blackf. Ind. R. 54, note.

(*d*) Ibid. 54; *Elliot* v. *Ray*, 2 Blackf. R. 31.

(*e*) *The Ohio and Ind. Railroad Co.* v. *Ridge*, 5 Blackf. R. 78.

for that statute, even the printed statute book of a sister state would be incompetent to prove the laws of such state, and parol testimony would not be evidence for that purpose; for the written laws of other states cannot be proven by such evidence.(*a*) Where a statute of a private nature is declared to be a public act, its contents need not be pleaded, nor shown to the court, but the court will take notice of them as they do of all other public statutes.(*b*)

§ 829. Under the statutes of Michigan, the printed copies of all statutes, acts, and resolves of the state, whether of a public or private nature, which shall be published under the authority of the government, shall be admitted as sufficient evidence thereof in all courts of law, and on all occasions whatsoever.(*c*) Printed copies of the statute laws of any other of the United States, or of the territories thereof, if purporting to be published under the authority of the respective governments, or if commonly admitted and used as evidence in their courts, shall be admitted in all courts of law, and on all occasions in this state, as *prima facie* evidence of such facts.(*d*)

§ 830. In regard to private statutes, resolutions, &c., the only mode of proof known to the common law, is either by means of a copy proved on oath to have been examined by the roll itself, or by an exemplification under the great seal. In those states where the statutes have made provision, that the printed copies of the laws and resolves of the legislature, published by its authority, shall be sufficient *prima facie* evidence of the statute, as is the case in the states above named; the common

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(*a*) *Comparet* v. *Jernegan*, 5 Blackf. R. 375.
(*b*) 5 Blackf. R. 171; *Beaumont* v. *Mountain*, 10 Bing. 404.
(*c*) R. S. 1837–8, 438, sec. 48.
(*d*) Id. sec. 49.

law rule in this respect seems to have been changed. There seems no good reason why a similar statutory provision should not be made in all the states, as it is the invariable course for the legislatures of the several states, as well as of the United States, to have the laws and resolutions of each session printed by authority. Confidential persons are selected to compare the copies with the original rolls, and superintend the printing. The very object of this provision is to furnish the people with authentic copies; and from their nature, printed copies of this kind, either of public or private laws, are as much to be depended upon as the exemplifications verified by an officer who is to keep the record.(*a*)

§ 831. In Massachusetts it has been held, that the printed book of the printers to the general court is not evidence of a private act, as it is of public statutes.(*b*) It is now, however, provided by statute that the printed copies of all statutes, acts, and resolves of the commonwealth, whether public or private, which shall be published under the authority of the government shall be admitted as sufficient evidence thereof in all courts of law, and on all occasions whatever.(*c*) A similar statutory provision exists in New Jersey.(*d*) In Illinois a similar provision exists, including statutes of the state and the United States, and the several states and territories.(*e*) The public statutes of other states, are not judicially noticed by the courts of other states, but are to be shown in the same manner as private statutes.(*f*)

(*a*) Greenl. Ev. sec. 480; 6 Bin. 326.

(*b*) *Kennebeck Purchase* v. *Call*, 1 Mass. R. 483.

(*c*) R. S. Mass. 1836, p. 577.

(*d*) R. S. N. J. 1847, p. 714.

(*e*) R. S. Ill. 1845, p. 232.

(*f*) *Pearsall* v. *Dwight*, 2 Mass. 84; *Legg* v. *Legg*, 8 Mass. 99; *Walker* v. *Maxwell*, 1 Mass. 104; *Beuchamp* v. *Mudd*, Hardin's R. 165; *Herring* v. *Selden*, 2 Aik. 12; *Elliot* v. *Ray*, 2 Blackf. R. 31; *Cone* v. *Cotton*, id. 82;

§ 832. As to the mode of the proof of foreign statutes, there is some diversity in the rule which prevails in the different states. By an act of congress, the acts of the legislatures of the several states (to be evidence) must be authenticated by having the seal of the respective states affixed thereto. A printed pamphlet containing the laws of one state is not evidence in another. Where the law offered in evidence was the insolvent law of the state of Louisiana, printed in a small pamphlet form, in the French and English languages, with no seal affixed; this law was held inadmissible, not being authenticated in the manner required by the act of congress, that is, under the seal of the state of Louisiana.(*a*) The written or statute laws of sovereign countries, without the United States, must be proved by the laws themselves,(*b*) if they can be procured; if not, inferior evidence of them may be received, and the unwritten laws by parol evidence.(*c*) That the laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts, cannot be questioned; but the public laws of a foreign nation on a subject of common concern to all nations, promulgated by the governing powers of the country, can be noticed as law by courts of admiralty in this country, if those laws have been promulgated in the United States, by the joint act of that department which is entrusted with foreign intercourse, and of that which is invested with the power of war, on the ground, that they assume a character of notoriety which renders them

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Stout v. *Wood*, 1 id. 71; *Canal Co.* v. *Railroad Co.*, 4 Gill & John. 1, 63; *Haven* v. *Foster*, 9 Pick. 112, 130; *Talbot* v. *David*, 2 Marsh. R. 603, 609; *Tarlton* v. *Briscoe*, 4 Bibb, 73, 75; 3 Wend. 267; 7 Wend. 435; 1 Paige R. 226.

(*a*) *Craig* v. *Brown*, Pet. C. C. R. 352.

(*b*) *Robinson* v. *Clifford*, 2 Wash. C. C. R. 1.

(*c*) *Consequa* v. *Wibling*, Pet. C. C. R. 225.

admissible in our courts.(*a*) An oath is required for the proof of foreign laws, unless they are verified by such other high authority which is equivalent to the oath of an individual. It has been held, that in order to prove the laws of Portugal, the principle that the best testimony shall be required which the nature of the case will admit of, or, in other words, that no testimony should be admitted which presupposes better testimony attainable by the party who offers it, applies to foreign laws as it does to all other facts. The certificate of the consul not sworn to, that the laws are truly copied from the originals, is not evidence. To give to such a certificate the force of testimony, it will be necessary to show that this is one of those consular functions to which, to use its own language, the laws of this country attach full force and credit. That although consuls are officers known to the law of nations, and entrusted with high powers, they do not appear to be entrusted with the power of authenticating the laws of foreign nations. They are not the keepers of those laws. They can grant no official copies of them. It was urged in the case where this question arose, that to require, respecting laws or other transactions in a foreign country, that species of testimony which their institutions and usages do not admit of, would be unjust and unreasonable. Marshall, Ch. J. said: "The court will never require such testimony. In this, as in all other cases, no testimony will be required which is shown to be unattainable. But no civilized nation will be presumed to refuse those acts of authenticating instruments which are usual, and which are deemed necessary for the purposes of justice. It cannot be presumed that an application to authenticate an edict by the seal of the nation, would be rejected, unless the

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(*a*) *Talbot* v. *Seeman*, 1 Cranch, 1.

fact should appear to the court, nor can it be presumed that any difficulty exists in obtaining a copy. Indeed, in this very case the testimony offered would contradict such a presumption. The paper offered to the court is certified to be a copy compared with the original. It is impossible to suppose that this copy might not have been authenticated by the oath of the consul as well as by his certificate."(*a*)

§ 833. The question as to the mode of the proof of the due enactment of a statute, under a constitutional requirement, has in the state of New York been the subject of much forensic and judicial discussion ; and as the subject is an important one, we deem it advisable in this connection to present, somewhat at length, the views and opinions which have been elicited on that subject. In *Thomas* v. *Dakin*,(*b*) the question was raised on demurrer. In that case the plaintiff sued as president of a banking association created under the general law authorizing the business of banking. The objection was taken that the act under which the association was formed did not, as was required by the constitution, receive the assent of two-thirds of the members elected to each branch of the legislature. But in this case it was admitted, that upon demurrer it would be presumed that the act had been constitutionally passed. The court did not, therefore, deliberately consider or pass upon this question. Mr. Justice Cowen, at the close of his opinion, said : " But this branch of the argument need not be pursued, for it was agreed on both sides, at the bar, that we must on this record presume the general banking law to have been passed by two-thirds of all the members elected to both houses. We must clearly do so, until

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(*a*) *Church* v. *Hubbart*, 2 Cranch, 187 ; 1 Cond. R. 393, 394.
(*b*) 22 Wend. R. 9.

the fact is denied by plea. The requisite constitutional solemnities in passing an act which has been published in the statute book, must always be presumed to have taken place, until the contrary should be clearly shown. Should the defendant withdraw his demurrer, and plead specially that the law in question did not receive the assent of two-thirds, as requiredby the constitution, it will then be in order to pass upon the solidity of such an objection." Bronson, J. also said: "It was conceded on the argument, that the demurrer does not reach the objection that the act was not passed by a two-third vote, and I have not, therefore, considered the question whether we can look beyond the statute book.

§ 834. This question again arose in the case of *Warner* v. *Beers, President*, and *Bolander* v. *Stevens, President*,(*a*) on demurrer to declarations by the plaintiffs as president of banks, created under the same act, upon a writ of error from the supreme court, who, in these cases, had adhered to the rule adopted in *Thomas* v. *Daken*, above cited. In these cases the point was distinctly made that the general banking law did not receive the assent of two-thirds of all the members elected to each branch of the legislature, which defect appeared by the law itself. Although the decision in these cases does not necessarily amount to an actual adjudication of the question by the court for the correction of errors, as the affirmance of the judgment of the supreme court was, by the resolution of the court, placed upon the ground that the law was constitutionally passed; although it might not have received a two-third vote, as such associations were not bodies politic or corporate, within the spirit and meaning of the constitution, still as this question was discussed at length by most of the members of

(*a*) 23 Wend. 103.

the court who delivered opinions, it may be regarded as indicative of what was the understanding of the members in regard to this question. We shall, therefore, present those views. Bradish, president, was of the opinion that the certificate of the secretary of state, as to the time of a passage of a bill by the two houses of the legislature, was *conclusive evidence* that such bill had been passed in due form, except as to bills referred to in the ninth section of the seventh article of the constitution of the state. In respect to such latter bills, inquiry might be made as to the number of the votes given on their passage. But such inquiry could not be by a *jury;* it must be by the court, by an inspection of the record in the secretary's office. The chancellor was of the opinion, that upon demurrer to a declaration in such a case, the court would not look beyond the statute book to ascertain whether the act was passed by a two-third vote or by a majority. He, however, expressed no opinion upon the question whether a court was authorized, in any way, to institute an inquiry into *the mode in which a law was passed*, where the act of the legislature had received the signature of the governor, and had been duly certified by the secretary of state. Senator Verplanck held, that the doctrine of Lord Coke: "That against a general act of parliament, or such an act whereof the judges ought *ex officio* to take notice *nul tiel record*, cannot be pleaded, applied to an act of our legislature. That it was the duty of the court, without the intervention of a jury, to inform themselves as to the legal existence of a statute the best way they could, by reference to the journals of the legislature, by adverting to uncontradicted contemporaneous public history, and by inspection of the statute in manuscript in the secretary's office."

§ 835. In the case of *Hunt* v. *Van Alstyne*,(a) the

(a) 25 Wend. R. 606.

same question again came before the supreme court under a plea that the Lockport Trust and Banking Company was an association formed under said act,—which association was formed for banking purposes without the assent of two-thirds of the members of the legislature, and contrary to the constitution of the state. In this case also the cause was disposed of on another ground. The chief justice, however, on this branch of the case, says: "The object of the special plea is to put on the record the question of fact whether or not the general banking law of 1838 was enacted by a *two-third* vote, within the ninth section of the seventh article of the constitution; and if not so passed, whether it can be upheld as a valid statute." After stating that the pleas were defective, he adds: "Both parties seem to desire that the defence should be met on the constitutional ground. In the cases already decided in this court and the court for the correction of errors, though the question whether it is practicable for the defendant to avail himself of this defence, by setting up the fact that the bill did not receive the assent of *two-thirds*, within the constitutional provision, was alluded to, no definitive opinions were expressed.(*a*) In the first case, the only one argued before us, it was conceded by the counsel on both sides, that the court must assume, nothing appearing on the record to the contrary, that the law was passed by the requisite constitutional vote; and we entertain no doubt of the correctness of this view. If we had felt justified in taking official cognizance of the fact otherwise, the result of our judgment in that case would have been different; in the latter case, the chancellor concurred with this court that on the demurrer interposed, he would not look beyond the statute book; in

(*a*) *Thomas* v. *Dakin*, 22 Wend. R. 113; *Warner & Roy* v. *Beers*, and *Borlander* v. *Stevens*, 23 Wend. 103.

other words, that the court was bound to assume, for the purpose of the decision, that every law there published was to be deemed constitutionally enacted; he reserved himself upon the question, whether the court could, in any form, institute an inquiry into the mode in which a law signed by the governor, and duly certified by the secretary of state, was passed. The president and Senator Verplanck, the only two other members delivering opinions, in which allusion is made to this point, also reserved themselves, intimating, however, a doubt whether an inquiry could be instituted beyond the record of the law." After adverting to the provision of the statute relative to the mode of publication and authentication of laws, he says: "I have always been inclined to the opinion, that upon a fair interpretation of these several provisions regarding their scope and purpose, the printed publication of the statute, both in the state papers and in the volume, should contain the endorsed certificates of the presiding officers and of the governor. The law comes into the hands of the secretary, with those endorsements inscribed, for his certificate, which would seem naturally to follow them; and this appears to me to be the shape in which publication was contemplated by the legislature. Looking, perhaps, solely at the insulated sections, directing the printing in the state paper and volumes, and construing the duty imposed with reference to them exclusively, the above intimation may not be well-founded. It is certain the usage has been to omit them. If the provisions prescribing the endorsements by the presiding officers and governor are merely directory and not imperative, or a condition to the validity of the law, then the omission would be of no importance; if otherwise, it is a matter of public convenience; if material to determine the validity of the law, within the two-thirds provision in the constitution, or within any of the sections of the revised statutes, regulating the

mode of the enactment of laws, they can still be brought to our notice, doubtless, by an exemplified copy of the original on file. Until this is done, we do not look beyond the statute as published by the requisite authority, and shall assume each there found to be constitutionally enacted. In the case before us, assuming that the pleas constitute a valid defence to the action, if true under the tests given in sec. 3, 1 R. S. 143, which declares that no bill shall be deemed to have been passed by the assent of two-thirds, unless so *certified by the presiding officers of each house*, an exemplified copy of the general banking law might determine the fact involved in them. If, on its production, no such certificate appeared, the court would be bound to regard it as passed by a majority *only*. But suppose it did appear, would it be conclusive? It seems to me it would be so. There are only two modes of contradicting it. 1. By the journals of the two houses; and, 2. By parol testimony. The presiding officer had all the benefits of the first. The ayes and noes were taken, and the journal made up under his supervision and control. His means of ascertaining and determining the fact, when he declares the law to be passed, exceed those of any other tribunal that might afterwards be called upon to inquire into it. Besides, the hurry and looseness with which the journals are copied, and the little importance attached to the printed copies, necessarily impair confidence in their correctness. They are most uncertain data upon which to found a judicial determination of the rights of property, much more of great constitutional questions. As to the second mode of contradicting the certificate, the evidence would, if possible, be still more fallible and unsatisfactory. Indeed, we can scarcely imagine a case where, from its nature, the proof would be so subject to the doubtful and conflicting recollection of witnesses. Nothing short of absolute necessity could justify a resort

to it. It would hardly deserve weight in contradicting the journal itself—much less the certificate of the presiding officer affixed to the law." He subsequently adds: "But I do not desire to be understood as committing myself upon the question, if, on a future investigation, when it shall be directly involved, these views shall be found untenable." Mr. Justice Cowen did not regard the decision of the court for the correction of errors, above cited, conclusive of this question; and in this case neither he nor Mr. Justice Bronson expressed any opinion on this point.

§ 836. This question again came under consideration in the case of *The People* v. *Purdy*.(*a*) The question in this case arose under the act of 14th May, 1840, annulling the power conferred upon aldermen in the city of New York by the city charter of 1830, to officiate as judges in the court of general sessions. Mr. Justice Bronson, in that case, at page 33, says: "But it is said that the act of 1840 did not receive the assent of two-thirds of the members elected to each branch of the legislature, and consequently that it is not a valid law. The fact that it did not have the vote of two-thirds of the members, was conceded on the argument; and we see, from the journals, that only one-half of the senators, and less than half of the members, voted for the bill on the final passage. How a question like this shall be tried, or whether it shall be tried at all, when a bill has gone through all the usual forms of legislation, are questions which were not considered in the case of *Thomas* v. *Dakin*.(*b*) They are now presented to this court for the first time. It has not been denied that the judicial tribunals of the state may, in some way, look beyond the printed statute book, for the purpose of ascertaining

(*a*) 2 Hill, 31. (*b*) 22 Wend. 9.

whether bills coming within the two-third clause of the constitution, have received the requisite number of votes: and although I have felt a good deal of difficulty on that question, I am inclined to the opinion that such an inquiry may be instituted. The question is, no doubt, one of great delicacy; but if the court have the right to entertain it, the duty is imperative, and we are not at liberty to shrink from its performance. We live under a government of laws, reaching as well to the legislative as to the other branches of the government; and if we wish to uphold and perpetute free institutions, we must maintain a vigilant watch against all encroachments of power, whether arising from mistake or design, and from whatever source they proceed. The constitution is explicit in its terms; and in a particular class of cases upon which the legislature may act, it denies to a bare majority of the members the power which in other cases they undeniably possess. To give efficiency to this provision, and secure the people against the exercise of powers which they have not granted, we must, I think, when called upon to do so, look beyond the printed statute book, and inquire whether bills creating or altering corporations have received the requisite number of votes. Statute laws may be read in evidence, either from the state papers or from the volumes published by the state printer.(*a*) It is also enacted, that "no bill shall be deemed to have been passed by the assent of two-thirds of the members elected to each house, unless so certified by the presiding officer of each house." To give full effect to this enactment, and provide a convenient mode of ascertaining whether the two-third clause in the constitution has been duly observed, the law should be published with all the usual evidences of their authenticity.

(*a*) 1 R. S. 181, 184, sec. 8, 12.

The certificate of the presiding officers of the two houses, and the approval of the governor, should be published, as well as the body of the law. But as this has not been the practice, I have examined the original engrossed bill on file in the secretary's office, and find that the act of 1840 is only certified by the presiding officers in the usual form of certifying *majority* bills. If this be not conclusive, it is at least *prima facie* evidence; and following the statute, this bill cannot be "deemed to have been passed by the assent of two-thirds of the members elected to each house."

§ 837. In the same case, in the court for the correction of errors,(*a*) the chancellor and senators Paige and Franklin held, that for the purpose of ascertaining whether an act was passed as a majority bill merely, or by a two-third vote, courts may look beyond the printed statute book to the certificate upon the original bill on file with the secretary of state. That if the bill be not certified by the presiding officer of the two houses respectively, in the mode pointed out by the statute, it must be deemed *prima facie*, at least to have been passed by a vote less than two-thirds, and senators Paige and Franklin were of the opinion that the journals kept by the two houses of the legislature, might be resorted to in ascertaining whether an act was passed by a vote of two-thirds. The chancellor was also of the opinion that the certificate of the secretary of state endorsed upon the bill, pursuant to the requirement of the statute, was not evidence that it was passed by a vote of two-thirds, at all events it was not conclusive. For it could never have been the intention of the legislature, to give to the secretary of state the exclusive right of deciding whether any of the provisions of a statute, which had been passed

(*a*) 4 Hill, 384.

by a majority vote only, required a vote of two-thirds. The certificate which the secretary is required to endorse upon the bill, related rather to the time when such bill became a law, than to the fact that it was passed by a constitutional vote of two-thirds; when all or any of its provisions require that it should be passed by such a vote. And the revised statutes having only declared the certificate of the secretary to be conclusive evidence of the facts contained therein, if he does not certify that it was passed by two-thirds of the members elected to each branch of the legislature, his certificate was not evidence that it was so passed; when such an inquiry becomes material in reference to the validity of any of the provisions of the law. The legislature had declared by law that no bill shall be deemed to have passed by a two-third vote, unless it is so certified by the presiding officer of each house, and he was therefore inclined to the opinion that such a certificate, rather than the certificate of the secretary of state specifying the time when the law was passed, was to be considered the only legal evidence that the bill was in fact passed by the assent of two-thirds of all the members elected to each branch of the legislature. In the case of *De Bow* v. *The People*,(*a*) Bronson, Ch. J., again held, that the question whether a particular act was passed by a two-third vote was to be determined, whenever it arises, by the court, who for that purpose are to examine the original law on file in the office of the secretary of state; and in the latter case he said that this question, as to whether the law did receive a two-third vote, was directly and necessarily presented, and that the court could not, if it would, turn aside from considering it.(*b*) It will therefore be per-

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(*a*) 1 Denio, 9.

(*b*) See also *The Commercial Bank of Buffalo* v. *Sparrow*, 2 Denio, 97.

ceived, that this most delicate and important question, so far as the state of New York is concerned, is judicially and definitely settled, and that whatever may be the rule in England on this point, the rule here is finally put at rest, and that too, as we think, in strict accordance with the spirit and genius of our peculiar political institutions, under a written compact defining and limiting legislative powers.

§ 838. I have now presented all the varied topics which I have deemed it important to discuss. It is due to myself in conclusion to say, that in the presentation of this branch of my subject I have considered it important to present many instances in which a particular rule of construction has been applied to particular cases, as illustrative of the rule itself, as well as its practical application by courts, and in such instances to present so many of the facts and circumstances of the case as to enable my readers, without a resort to the cases themselves, to readily perceive the extent to which the rule itself has been carried, and the mode of applying it. In considering the rules of construction under the varied heads of remark, I have also in some instances presented in juxta-position the varied views of judges in reference to a given topic, even at the expense of a repetition of similar views, when considering the same subject under a different head, and also in instances where the same rule was adopted, but a different application made of it; or its application was to be considered under a somewhat varied aspect, by way of illustration. With this apology for the fault of prolixity in this respect, I close this work, and to all human probability, under my present impressions, terminate my labors as a legal author.

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